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# The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?

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# THE ASBESTOS LITIGATION CRISIS: IS THERE A NEED FOR AN ADMINISTRATIVE ALTERNATIVE?

Lester Brickman\*

## INTRODUCTION

No litigation in American history has involved as many individual claimants, been predicated upon the severity of injury, consumed as many judicial resources, resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies, or been as lucrative to lawyers as asbestos litigation. Asbestos litigation has been referred to as an "impending disaster"<sup>1</sup>—a crisis situation. Even though 100,000 claims have already been resolved, 100,000 new claimants now seek compensation. For each claim resolved, two to three new claims are being filed. More than a dozen major defendant companies have been driven into bankruptcy, thereby reducing the size of the asset pool available to compensate the severely injured.<sup>2</sup>

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\* Professor of Law, Benjamin N. Cardozo School of Law (Yeshiva University). This Article is a significantly revised version of a paper I prepared for a colloquy of the Administrative Conference of the United States. My research assistant, Doreen E. Ferrera, has been invaluable in the transformation of the colloquy paper into this Article. I would also like to express appreciation to United States District Court Judge Jack B. Weinstein and to my colleague, Paul Shupack, who have made many helpful suggestions.

Some of the data that I refer to in this Article was obtained during the course of consulting work on contingent fees and punitive damages that I did for an asbestos defendant; however, most of the unpublished empirical data which I refer to was obtained as part of my research for this Article. As noted at the colloquy, because of this and other opportunities I have had to "extensively review empirical data, case files and other materials" on asbestos litigation, the Administrative Conference of the United States asked me to "draft a proposed administrative solution" to the asbestos litigation crisis which the panelists at the colloquy were invited to criticize. Chairman Marshall Breger, Introduction of Lester Brickman, *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States 4 (Oct. 31, 1991). The Administrative Conference provided me with a token honorarium for this effort and for organizing the colloquy; in addition, I received the usual administrative support from my law school.

<sup>1</sup> See *Report of the Ad Hoc Committee*, Judicial Conference Ad Hoc Committee on Asbestos Litigation, March 1991, at 26 [hereinafter *Report*].

<sup>2</sup> To date, fifteen major asbestos producers have commenced bankruptcy proceedings, and a sixteenth has dissolved. These include: National Gypsum Co., No. 390-337213-SAF-11 (N.D. Tex. filed Oct. 28, 1991); Eagle-Picher Indus., No. 91-00100 to 00107 (S.D. Ohio filed Jan. 7, 1991); Celotex Corp., No. 1001168B1 (M.D. Fla. filed Oct. 18, 1990); Carey Canada, Inc., No. 100168B1 (M.D. Fla. filed Oct. 18, 1990); Pacor, Inc., No. 86-03252G (E.D. Pa. filed July 1986); Forty-Eight Insulations, Inc., No. 85-B-5061 (N.D. Ill. filed Apr. 17, 1985); Amatex Corp., No. 82-05220S (E.D. Pa. filed Nov. 1, 1982); Johns-Manville, Corp., No. 82-B-11656-176 (S.D.N.Y. filed Aug. 26, 1982); UNR Indus., No. 82-B-9841 to -9845 -9849 -9851

The seeming unending growth in the number and valuations of claims that courts and juries are producing will inexorably lead to additional defendants' bankruptcies. Those who peer into the future see an estimated cost to defendants ranging from thirteen to thirty billion dollars<sup>3</sup>—valuations wholly inconsistent with the continued solvency of most currently named defendants.<sup>4</sup>

Much has already been written about asbestos litigation<sup>5</sup> and on the efforts of the Johns-Manville Corporation, the Raybestos-Manhattan Corporation and other asbestos-containing material manufacturers to suppress information regarding the hazards of asbestos inhalation.<sup>6</sup> The injuries visited upon thousands of workers occupationally exposed to asbestos products have also been well documented.<sup>7</sup> This article does not recapitulate that history. In omitting the historical background of asbestos litigation, I do not mean to contest the public record of suppression or corporate irresponsibility and culpability; neither do I address the appropriateness of rewarding those lawyers who undertook considerable risk by devoting the time and effort to uncovering the facts of the suppression nor the appropri-

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(N.D. Ill. filed July 29, 1982). A sixteenth has dissolved. *North Am. Asbestos Corp.*, 179 Cal. Rptr. 889 (Cal. Ct. App. 1982).

<sup>3</sup> A leading expert in asbestos litigation, Mark Peterson, estimated that defendants would face costs of \$13 to \$16 billion to indemnify and defend asbestos claims *pending* as of May 7, 1991. See *In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken)*, 129 B.R. 710, 933 (E. & S.D.N.Y. 1991). United States District Court Judge Jack Weinstein has projected that defendant's total costs for future as well as pending claims would at minimum be \$19.6 billion, but more plausibly \$26 to \$28 billion. *Id.* at 907. On another occasion, Judge Weinstein estimated the tort value of pending and future claims to be \$30 billion. See *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States 4 (Oct. 31, 1991) [hereinafter *Administrative Alternative*]. Dean Paul McAvoy of the University of Rochester Business School estimates a total cost of \$50-100 billion. Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 79.

<sup>4</sup> Overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of [their] insolvency . . . ."

*Findley*, 129 B.R. at 751 (citations omitted).

<sup>5</sup> See, e.g., THOMAS E. WILLGING, *ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES* (1985); THOMAS E. WILLGING, *TRENDS IN ASBESTOS LITIGATION* (1987); Linda S. Mullinex, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y (forthcoming 1992); *Special Project: An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983); Jack B. Weinstein & Ellen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 270 (1991).

<sup>6</sup> See, e.g., PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* (1985).

<sup>7</sup> See generally *id.*

ateness of imposing liability upon those who actively participated in the suppression.

This article considers whether the tort system can resolve current and future asbestos claims. It argues that an alternative system of claims resolution—that is, an administrative alternative—may be required and may well be preferable.

Justifying the conclusion that an administrative alternative is preferable calls for an examination of the dynamics of asbestos litigation. What is driving the claims process? Why are valuations increasing? Why are larger numbers of lesser injured and noninjured claimants entering the process? What means of docket control are courts using to deal with ever-increasing caseloads? What impact do these judicial resolutions have on docket problems or the claim process? And what role do contingent fees play in the litigation?

In current asbestos litigation, courts are compensating enormous numbers of claimants injured by exposure to asbestos-containing materials.<sup>8</sup> Courts—confronted with deserving claimants possibly unable to gain compensation through the tort system because they cannot meet some of its requisite tests—appear to relax these rules so that they can do substantial justice.<sup>9</sup> Where claimants, for example, have probably been injured by exposure to a specific defendant's products but cannot prove that injury, some courts allow circumstantial evidence or hearsay testimony to establish the nexus or causality.<sup>10</sup> Other courts give plaintiffs' attorneys additional leeway to influence the jury by rhetoric or allow introduction of documentary evidence of corporate bad character—evidence which does not deal with whether the plaintiff is injured, whether defendant's products caused the injury, or whether defendant appropriately warned of the dangers in using its products.<sup>11</sup> Some claimants are allowed to introduce documentary evidence of the egregious actions of other actors in asbestos litigation; for example, the Manville Corporation or Raybestos-Manhattan, even though these actors are not defendants in that litigation.<sup>12</sup> This evidence taints the named defendants in the minds of jurors who therefore tend to award more compensation to the injured

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<sup>8</sup> While only a tiny fraction of asbestos claims are litigated, in the range of one percent, *Findley*, 129 B.R. at 747, settlement values are driven by judgments.

<sup>9</sup> See *infra* notes 86-137 and accompanying text discussing the specialized legal regime created for asbestos cases.

<sup>10</sup> See *infra* notes 89-106, 130 and accompanying text.

<sup>11</sup> See *George v. Celotex Corp.*, 914 F.2d 26 (2d Cir. 1990); see also *infra* notes 19, 127-28 and accompanying text.

<sup>12</sup> See *King v. Armstrong World Indus.*, 906 F.2d 1022, 1025 (5th Cir. 1990); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 668-71 (Tex. Ct. App. 1991); but cf. *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1159-60 (4th Cir. 1986). See also *infra* note 110.

claimant.<sup>13</sup>

After the bankruptcy of one defendant significantly reduced the pool of assets available to compensate claimants for their injuries, witnesses re-recalled that the bankrupt defendant's products, all previously asserted to constitute the largest amount of product in the workplace, instead constituted a far more meager market share.<sup>14</sup> This change in witnesses' testimony—which was readily observable—was tolerated if not welcomed by courts deeply concerned over the diminution of the available asset pool. Indeed, the impact of a series of bankruptcies which significantly reduced the pool of assets available to compensate claimants led some courts to counter by liberally construing the corporate culpability of other defendants and holding successors liable for the actions of subsidiaries undertaken prior to the purchase of the subsidiaries.<sup>15</sup> The lack of sufficient resources to compensate injured claimants also led some courts to decide insurance coverage issues by elevating maximization of available resources over policy construction.<sup>16</sup> Some courts whose dockets became so overloaded that compensation for seriously injured claimants was being delayed by years and even a decade or more,<sup>17</sup> devised strategies to accelerate the process, by consolidating cases into groups of tens, or hundreds, or thousands; in extreme circumstances, the trial process was truncated or substantially dispensed with.<sup>18</sup> In some cases, these courts, either by refusing to sever trials or by ordering mass consolidations, have overwhelmed the jury's ability to keep separate the evidence introduced against one defendant from the evidence introduced against another defendant; these actions also effectively allow use of evidence introduced against one defendant to be used against another defendant even though if the latter defendant had been separately tried, that evidence could not have been introduced.<sup>19</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> See Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891, 1894 n.13 (1992).

<sup>15</sup> See generally *infra* notes 266-77 and accompanying text.

<sup>16</sup> See *infra* note 51 and accompanying text.

<sup>17</sup> For example, in Philadelphia, the delay from filing to trial in asbestos cases is approximately eight to nine years. See LEGAL INTELLIGENCER, Aug. 5, 1991, at 20-25.

<sup>18</sup> See *infra* notes 230-65 and accompanying text.

<sup>19</sup> This Court, when faced with the problem of nearly one hundred pending asbestos cases on its docket, and more surely to come, made a decision. The congestion these cases caused in this district for all civil litigants gives one a skewed view of how to resolve the problem. The "Try-as-many-as-you-can-at-one-time" approach is great if they all, or most, settle; but when they don't, and they didn't here, thirteen shipyard workers, their wives, or executors if they have died, got a chance to do something not many other civil litigants can do — overwhelm a jury with evidence[e]vidence that would not have been admissible in any single plaintiff's

Examined case by case, the judicial responses to the asbestos tragedy can usually be justified by the exigencies of each claim—the need to do substantial justice for those seriously injured by corporate irresponsibility particularly in a milieu in which adequate compensation would not otherwise be available because of the absence or inadequacy of personal insurance and the lack of a national health insurance program.

The focus of this article is on the aggregate effect of these decisions. When viewed in the aggregate, the individual decisions add up to a total that appears to far exceed any simple summation. In the aggregate, there appears to have been a fundamental recasting of the “law” governing asbestos litigation over the past decade. It is not that leading asbestos jurists jointly determined that the absence of a national health insurance program to deal with asbestos-related injury necessitated the creation of a functional equivalent.<sup>20</sup> But a functionally equivalent legal regime may be found at the point of convergence of efforts to compensate large populations of workers irresponsibly exposed to asbestos-containing materials through decisions regarding insurance coverage, successor liability, punitive damages, statutes of limitation, evidentiary issues, and mass consolidations.

The decisions creating this legal regime rely upon inconsistent factual premises. For purposes of creating the unprecedented level of funding necessary to compensate large numbers of impaired workers,

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case had these cases been tried separately. As the evidence unfolded in this case, it became more and more obvious to this Court that a process had been unleashed that left the jury the impossible task of . . . carefully sort[ing] out and distinguish[ing] the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects.

Cain v. Armstrong World Indus., No. 87 Civ. 1172, slip op. at 18-19 (S.D. Ala. Feb. 18, 1992).

<sup>20</sup> The focus of this Article is, of course, on judicial decision making. Any observation of social phenomena is necessarily incomplete; the choice of what to observe must necessarily lead to the exclusion of other related phenomena. Indeed, the choice of what to focus on reflects as much the observer's point of view as the “facts” being observed. No doubt, other observers, having different observational standpoints, would choose to focus on different facets of asbestos litigation.

Readers of earlier drafts of this Article have indicated that it may be read to suggest the existence of a critical mass of asbestos jurists sitting down to create a national asbestos compensation policy. That is, by looking upon what courts are doing in the aggregate and focusing on asbestos claims decision making from the perspective of its potential contribution to the creation of an overarching national policy, this Article may be read to say, or at least presume, that some asbestos judges are engaged in a conscious effort to formulate such a national policy rather than seeking to fairly and conscientiously resolve the very large numbers of asbestos-related claims pending in their courts. I mean to do no such thing. Judges, sitting in asbestos cases, are trying to resolve an enormously complex social problem, often without the requisite tools for doing so. In this Article, I have neither set out to find fault with their decision making nor to cast stones, but rather to point out some of the aggregate outcomes of asbestos decision making and to examine those outcomes from a policy perspective.

insurance policies were interpreted to maximize liability coverage of asbestos-containing material manufacturers.<sup>21</sup> These decisions were premised on a finding that the manufacturers did not know and could not have been aware of the injuries being caused to workers in other industries by exposure to the manufacturers' products. For purposes of making these funds available to claimants, however, manufacturers were found to have known at the time of exposure that their products were causing injury.<sup>22</sup> Moreover, the resultant legal consequences have not been determined on the basis of legal standards prevailing during the 1940-1970 period of exposure. Instead, for purposes of assessing manufacturers with liability, the legal consequences of these product sales have been determined by a new set of tort standards, developed in the mid-1970's and further refined in the 1980's, that in some cases operated to retroactively impose liability on the manufacturers for acts that took place ten to forty years earlier.<sup>23</sup>

Lending impetus to the creation of this legal regime was the fact that many asbestos claimants—including some of the most seriously injured—worked in shipyards during World War II, where they were exposed to respirable asbestos resulting after long latency periods in mesothelioma,<sup>24</sup> asbestosis,<sup>25</sup> and other diseases. While they were not members of the nation's armed forces, and therefore not eligible for veteran's benefits or medical treatment at government expense, their efforts were a major part of the nation's war effort. Most decision makers would have a natural tendency to be sympathetic to these builders of the ships that transported the United States to victory in the war. Had there been a national health program that would have provided both adequate medical care and income replacement, judges may well have been less inclined to recast the law governing asbestos litigation. But in the absence of such a program, and the insulation of the United States government from liability for its own actions in running the shipyards,<sup>26</sup> one cannot take issue with a policy that worthy

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<sup>21</sup> See *infra* note 51.

<sup>22</sup> See *infra* notes 51 and 271.

<sup>23</sup> See *Borel v. Fibreboard Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Beshada v. Johns-Manville Prod. Corp.*, 447 A.2d 539 (N.J. 1982); see also *infra* note 109. Retroactive application of tort rules is eschewed when it would diminish defendants' liability. See *Russell v. Superior Ct.*, 230 Cal. Rptr. 102 (Cal. Ct. App. 1986) (denying retroactive application to asbestos defendants of law abolishing joint and several liability).

<sup>24</sup> Mesothelioma is a fatal cancer of the pleura and peritoneum, caused by exposure to asbestos. Disease manifestation occurs decades after exposure. See ANDREW CHUNG & FRANCIS H.Y. GREEN, *PATHOLOGY OF OCCUPATIONAL LUNG DISEASE* 288 (1988); ALFRED P. FISHMAN, *PULMONARY DISEASES AND DISORDERS* III, 2034-38 (2d ed. 1988); see also *infra* notes 93-100.

<sup>25</sup> See *infra* note 112.

<sup>26</sup> See, e.g., *Eagle-Picher Indus. v. United States*, 937 F.2d 625 (D.C. Cir. 1991).

plaintiffs ought not to be denied compensation for injury resulting from corporate or governmental irresponsibility by formalistic rules of evidence and procedure even if that required application of different rules to asbestos cases.<sup>27</sup>

Most special "asbestos law" has been formulated in the past decade, and particularly after the bankruptcy of the Johns-Manville Company (now recast as the Manville Corporation). It is my thesis that "asbestos law" underwent a fundamental change after this bankruptcy. Driven by the need to fill the financial void created by the bankruptcy or else have to deny adequate compensation to meritorious claimants, courts and claimants have determinedly imposed Manville's former liability share<sup>28</sup> upon others.<sup>29</sup>

These efforts contributed to the creation of a perverse incentive structure. As judges succeeded in imposing increased liability and drawing in additional asset pools, plaintiffs' lawyers were motivated by the increased availability of assets to search out ever-increasing numbers of claimants. As judges applied procedural and substantive rules to assure compensation for the injured, plaintiffs' lawyers were motivated to search for lesser impaired and functionally unimpaired<sup>30</sup>

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<sup>27</sup> See Weinstein & Hershenov, *supra* note 5, at 323 (providing compensation for those injured where cause-in-fact cannot be proven by strict tort standards or where specific individual liability cannot be ascertained "is particularly important [for the judiciary] in the absence of any alternative remedies emanating from the executive or legislative branches.").

<sup>28</sup> Manville's pre-bankruptcy share of damages was approximately 30%. *In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken)*, 129 B.R. 710, app. A at 913 (E. & S.D.N.Y. 1991).

<sup>29</sup> When the Manville money faucet was shut off, "we [a leading plaintiffs' firm] had five or six verdicts [against Manville] probably totaling in excess of three million dollars" . . . even a previously issued check from Manville bounced. The firm had banked on its solid liability case against Manville. With the asbestos giant's funds indefinitely out of reach, the firm had to scramble to retool its practice. "[I]t required a whole rethinking of our case strategy . . . [W]e had to find some new targets."

Karen Dillon, *Only \$1.5 Million a Year*, AM. LAW., Oct. 1989, at 38, 40 (quoting Joseph Rice and Ann Kimmel Ritter).

<sup>30</sup> Impairment is a significant issue in asbestos litigation. The term "impairment" however has no precise meaning. The American Medical Association defines it as "the loss of, loss of use of, or derangement of any body part, system or function." AMERICAN MEDICAL ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 2 (3d ed. 1988), cited in Norwood S. Wilner, *Impairment in Asbestos Litigation* [hereinafter *Impairment*], in DEFENSE RESEARCH INST., THE 1991 ASBESTOS MEDICINE SEMINAR G-2 (Oct. 16-18, 1991). The AMA definition is problematic when applied to asbestos litigation. Consider the issue of whether lung changes such as those appearing on x-rays in the case of pleural plaques constitute a "derangement" of a body part. See *infra* note 138.

Impairment may also be defined as the loss of capacity to do exercise within certain criteria of normalcy. *Impairment, supra*, at G-3. Another definition, inability to work at a specified task or trade, imports elements of disability. *Id.* The distinction between impairment and disability has been drawn as follows:



occupationally-exposed workers and others to whom to apply increasingly less rigorous standards. As judges sought to cope with substantial case backlogs by truncating trials and by mass consolidations, plaintiffs' lawyers, driven by the powerful contingent-fee engine, responded by refilling the case pipelines. The more successful courts became in devising ways to more quickly and assuredly compensate the meritorious, the larger the number of unmeritorious claims that were able to enter the system.

Under the dynamic created by the resulting perverse<sup>31</sup> incentive structure, judicial efforts to resolve such pressing issues as eligibility of the meritorious for compensation, case volume, and the availability of financial resources have been subverted by the resultant: increased claims by the unmeritorious who are appropriating a larger share of

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Respiratory *impairment* is best defined [sic] as an abnormality of physiologic function that persists after treatment; in short, an inability of the organs of respiration to carry out one or more of the three components of respiration[sic]: ventilation, diffusion, and perfusion. *Disability* or disablement is best defined as an inability to carry out a specific task or job or, alternatively, the presence of undue distress during the performance of that task or job.

W.K.C. Morgan, *Pulmonary Disability and Impairment—Can't Work? Won't Work?*, 28 RE-SPIRATORY CARE 471 (1983), quoted in *Impairment*, *supra*, at G-3 n.3.

Impairment as it relates to asbestos litigation involves the question of injury: what degree of impairment, if any, is required to constitute legal injury. In *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990), the court held that in the absence of impairment as variously defined above, the legal standard for injury has not been met:

In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring . . .

Plaintiffs must show a compensable harm by adducing objective testimony of a functional impairment due to asbestos exposure. A claimant's subjective testimony as to shortness of breath and fatigue without more is not sufficient. In other words, the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by objectively verifiable functional impairment is not enough.

*Id.* at 1567 (emphasis omitted).

The issue of impairment is of vital concern with regard to pleural plaques. Pleural plaques rarely are impairing. See *infra* notes 138-40. Thus, in *Wright v. Eagle-Picher Industries*, 565 A.2d 377 (Md. Ct. Spec. App. 1989), the court approved a trial court jury instruction that pleural plaques did not constitute injury under Maryland law. See also *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. Ct. App. 1987); *Owens-Illinois v. Armstrong*, 591 A.2d 544 (Md. Ct. Spec. App.), *cert. granted*, 595 A.2d 1077 (Md. 1991); *Ayers v. Township of Jackson*, 461 A.2d 184 (N.J. Super. Ct. Law Div. 1983), *rev'd in part and aff'd in part*, 525 A.2d 287 (N.J. 1987). It is the allowance of compensation without impairment, that is, the holding that pleural plaques constitute compensable legal injury regardless of impairment, and the allowance of claims of asbestosis by unimpaired persons, see *infra* notes 119-25, 129 and accompanying text, that gives rise to the "asbestos lottery," see *infra* notes 156-59 and accompanying text, and constitutes a critical component of the asbestos-litigation crisis.

<sup>31</sup> In terming the resultant incentive structure "perverse," I am applying the value system that asbestos jurists are effectuating as reflected by their individual decisions; that is, it is perverse from the point of view of asbestos jurists.

the available resources; higher case volumes; increased defense costs; additional defendants' bankruptcies; and depreciation of the value of meritorious claims.<sup>32</sup>

In light of the increasing awareness of the aggregate result of asbestos litigation, some jurists have begun to question the wisdom of prior holdings. With the benefit of hindsight, they would seek to recap the punitive damages genie, declare a moratorium on mass consolidations, remove the claims of the unimpaired from the purview of overly-generous juries by use of pleural registries<sup>33</sup> and court-appointed medical experts, apply brakes to the runaway contingent-fee engine, and reduce the incentives to keep the case pipeline full. A successful and complete reengineering of asbestos litigation could wind down the litigation over a period of ten to fifteen years though it likely would not avoid additional defendants' bankruptcies.

Success, however, is unlikely. In the highly mobile asbestos-claims market,<sup>34</sup> the efforts of one jurist to undo the perverse incentive structure is easily countered by other jurists not similarly inclined.<sup>35</sup>

The process set in motion by the myriad decisions constituting the body of "asbestos law" appears to have too much momentum to be redirected. Trend reversal of such magnitude that it would substantially eliminate the claims of the unimpaired, restrict punitive damages, decelerate the rapid rise in claim valuations, remove Russian Roulette as a prime ingredient of some mass consolidations, and

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<sup>32</sup> In commenting on the jury verdicts in the federal Brooklyn Naval Yard cases, Judge Weinstein observed: "Families who are in serious difficulty and have established, to a high degree of probability, a substantial amount of fault, received nothing. Other families who have a case in which probabilities are substantially lower and who are in much less need, receive[d] huge sums." Transcript of Proceedings Before Hon. Jack B. Weinstein, at 5-6, *In re New York Asbestos Litig.*, (E.D.N.Y. Jan. 24, 1991) (Tr. No. TS 90-9999) [hereinafter Transcript].

<sup>33</sup> See *infra* note 147.

<sup>34</sup> Forum shopping is widespread in asbestos litigation. If plaintiffs' lawyers come to regard the efforts of United States District Court Judge Charles Weiner, who has been designated by the Multi District Panel with pretrial authority to resolve the 31,000 asbestos claims pending in federal court, see *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 424 (J.P.M.L. 1991), as unsatisfactory, they may simply shift the cases to state courts; indeed, some may have anticipated the need and double filed. Typically, claims by Alabama residents for asbestos-related injuries which occurred in Alabama which are barred by the Alabama statute of limitations are brought in Texas.

<sup>35</sup> United States District Court Judge Lee Sarokin, after deciding that the repetitive awarding of punitive damages in asbestos cases to New Jersey claimants violated defendants' constitutional rights, reconsidered and vacated his holding. *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233 (D.N.J. 1989). Presumably, he was convinced that the effect of precluding punitive damages in federal court in New Jersey would be to effectively transfer part of New Jersey's claim on asbestos defendant assets to other jurisdictions which did not limit punitive damage awards. 705 F. Supp. 1053 (D.N.J. 1989), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989); see also *infra* note 52.

reduce the incentives of the plaintiffs' bar to convert asbestos litigation into a form of personal annuity, is not likely attainable under the aegis of the current tort system.<sup>36</sup> Only an administrative alternative to legislation enacted by the Congress can bring about the requisite changes.

This Article seeks to explore the need for such an alternative and, in an accompanying article, to posit one.

## I. THE NEED FOR LEGISLATION

In September 1990, United States Supreme Court Chief Justice William H. Rehnquist appointed the Ad Hoc Committee on Asbestos Litigation to "address . . . the massive and complex issues involved with asbestos litigation"<sup>37</sup> and to "consider all necessary administrative steps that may be taken under existing law . . . [as well as] legislative remedies or amendments to the federal rules of practice and procedure."<sup>38</sup> The Committee of five district court judges, chaired by Judge Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit, issued a report in March 1991 that was subsequently adopted by the Judicial Conference of the United States. The Committee recommended that Congress enact:

a national legislative scheme to come to grips with the impending disaster relating to resolution of asbestos personal injury disputes, with the objectives of achieving timely appropriate compensation of present and future asbestos victims and of maximizing the prospects for the economic survival and viability of the defendants.<sup>39</sup>

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<sup>36</sup> See *Report*, *supra* note 1, at 7.

<sup>37</sup> See *id.* at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 27. Alternatively, the Committee recommended federal legislation that would create a procedure for mass consolidation of asbestos claims by courts. The Committee considered appending proposed legislation to the *Report*, and though it caused a proposal to be drafted, the Committee did not proceed out of concern that the specifics of a draft might divert attention from the *Report's* main thrust: the need for legislation.

The *Report's* analysis of current asbestos litigation has been criticized by the defense bar for its failure to discuss the problem of meritless claims—alleged to constitute well in excess of half of all pending claims and even a higher percentage of new claims—brought by unimpaired claimants. The *Report* has also been criticized for its failure to acknowledge that defendants often have viable defenses to many asbestos claims. See John D. Aldock et al., A Critical Analysis of the Report of the Ad Hoc Committee on Asbestos Litigation 35-41 (May 7, 1991) (unpublished paper, on file with the author). Moreover, its alternative recommendation (i.e., enacting federal legislation creating a mass consolidation procedure) has resulted in the sounding of a cautionary note by Judge Thomas Hogan in his dissent from the *Report*.

I must respectfully dissent from the report and its [alternate] recommendations. It is unassailable that there is a national crisis involving asbestos litigation in the state and federal courts. My concern is the underlying premise of the report regarding the use of class action "collective" trials (trials by aggregation of claims) of asbes-

Like most observers of asbestos litigation, the Committee concluded that the volume of asbestos litigation has reached "critical dimensions . . . [and] is becoming a disaster of major proportions . . . which the courts are ill-equipped to meet effectively."<sup>40</sup> The Judicial Panel on Multidistrict Litigation has reached similar conclusions.<sup>41</sup> Indeed, Congress's failure to act to resolve the crisis has been cited as justification for judicial resort to mass consolidations and national disposition techniques.<sup>42</sup>

The Committee's call for legislation echoes many similar calls by the courts which have noted "Congress' silence in the face of a desperate need for federal legislation in the field of asbestos litigation."<sup>43</sup> Judge William Schwarzer, on leave from the United States District Court in San Francisco and serving as director of the Federal Judicial Center in Washington, D.C., has written that "Congress needs to adopt legislation that creates a national solution, invoking its power over commerce."<sup>44</sup>

Congressional inaction in this area is attributable to many factors.<sup>45</sup> To some of the leading asbestos jurists, however, the reasons for such inaction are irrelevant; if Congress has not acted, then the

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tos cases. It is a novel and radical procedure that has never been accepted by an appellate court. It has been challenged as being constitutionally suspect in denying defendants their due process and jury trial rights as to individualized claimants, as well as conflicting with the court's obligations to apply state law. It would establish a new form of tort liability with far reaching ramifications to other mass tort-cases. . . . As the Committee recognizes, a national solution is the only answer. Since the aggregation or collective trial method is highly questionable, a logical and viable solution would be the passage by Congress of an administrative claims procedure similar to the Black Lung legislation.

*Report, supra* note 1, at 41-42.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> See, e.g., *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991).

<sup>42</sup> See *infra* notes 46 and Part II.F.

<sup>43</sup> *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir. 1986) (Clark, C.J., dissenting) ("[T]he Court is frustrated by lack of congressional action."); see also *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1236 (D.N.J. 1989) ("[T]he need for uniform legislation is manifest").

<sup>44</sup> William W. Schwarzer, *Punishment Ad Absurdum*, CAL. LAW., Oct. 1991, at 116.

<sup>45</sup> Among the reasons for this inaction may be the courts' response to Congressional inaction; that is, the mass consolidations being orchestrated by some state and federal courts. See generally *infra* notes 230-65 and accompanying text. This judicial strategy may have lessened the political pressure on Congress to devise an administrative solution. The judicial line being tread, however, is a fine one. Case-by-case resolution is frustratingly slow to judges with asbestos caseloads in the hundreds and thousands. Some claimants die from asbestos-caused diseases while awaiting their turn in the trial line. On the other hand, judicial innovation, with all its attendant dangers to defendants' rights, coupled with the powerful contingent-fee engine, creates incentives for larger numbers of plaintiffs to advance claims while simultaneously lessening the need for Congressional intervention.

courts must step in and fill the breach.<sup>46</sup>

## II. JUDICIAL DECISION MAKING AND THE VOLUME AND EXTENT OF ASBESTOS LITIGATION

Courts have played a role in the rapid growth in recent years of the volume of asbestos claims litigation<sup>47</sup>—a growth so rapid as to give rise to the appellation: the “asbestos-litigation crisis.”<sup>48</sup> To be sure, judicial rulings have resulted in the dismissal of thousands of unmeritorious cases.<sup>49</sup> But this has occurred in a context of ever-

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<sup>46</sup> As United States District Court Judge Jack Weinstein has noted: “If Congress will not act, the courts and parties must.” *In re Joint E. & S. Dists. Asbestos Litig.* (Findley v. Blinken), 129 B.R. 710, 908 (E. & S.D.N.Y. 1991). Judge Weinstein also noted that:

We cannot agree with either the critics of liberal access or with those who argue that we should return to a traditional fault-based tort regime. . . . The post-war role of the federal courts—particularly when they were exercising their equitable jurisdiction—has been to protect the injured who come before them against those who have caused or are causing unjustified harm. This judicial role is particularly important in the absence of any alternative remedies emanating from the executive or legislative branches.

Weinstein & Hershenov, *supra* note 5, at 323.

<sup>47</sup> “There are many places to put the blame for this disturbing situation, but the court system must assume its part of the responsibility . . . .” Statement of Judge Thomas M. Reavley Before the House Subcommittee on Intellectual Property and Judicial Administration 4 (Oct. 24, 1991) (copy on file with author).

<sup>48</sup> As of December 11, 1991, 187,430 claims had been brought against the Manville Personal Injury Settlement Trust which was set up under the Manville bankruptcy reorganization for the disposition of asbestos-related personal injury claims against the Manville Corporation. Telephone Conversation with Judge Jack Weinstein, District Court Judge in the Eastern District of New York (Dec. 12, 1991).

According to records maintained by several defendants, new claims are being filed against asbestos defendants at the rate of 1000-2000 per month. The rate of filings declined in the July-October 1991 period, possibly portending the onset of a concluding phase to asbestos litigation. However, in November and December of 1991 the rate of filings increased substantially and the 1000-2000 average new filings per month resumed. Since new filings exceed dispositions by a significant margin, caseloads for most defendants continue to grow, currently amounting to approximately 100,000 claims; 31,000 of those claims are pending in federal courts, with the remainder in state courts. For example, Owens-Illinois has reported that while it disposed of 10,000 cases in 1989, 20,000 new cases were filed; and in 1990 while only 9,000 cases were disposed of, 20,000 more were filed. In the first nine months of 1991, 20,000 cases were disposed of while 10,000 new ones were filed. OWENS-ILLINOIS, INC., PROSPECTUS 48 (Dec. 11, 1991) [hereinafter OI PROSPECTUS]. For the Keene Corporation, the increase in the backlog of claims for year-end 1991 over 1990 was 12,000. See KEENE CORP., 1991 ANNUAL REPORT 16 (1992). This ever-growing backlog—beyond the ability of courts to effectively deal with—coupled with defendants’ bankruptcies constitute the asbestos-litigation crisis.

<sup>49</sup> For example, the tireworker-asbestos cases involve some instances of blatant fraud; for a telling account, see Oliver & Spencer, *supra* note 3, at 77-78. Two entrepreneurial Los Angeles attorneys organized the National Tire Workers Litigation Project to litigate the claims of tireworkers exposed to asbestos in the tire-making process. To generate plaintiffs, the attorneys set up screening centers in workplaces nationwide to test for asbestos-related disease. The doctors hired to perform the screenings (one of whom was not licensed to practice in the

widening extension of access to judicial arenas to those claiming injury from exposure to asbestos-containing materials.

The net effect of courts' efforts to deal with asbestos-related injury may be seen to be the creation of an equivalent to a national health insurance program.<sup>50</sup> The "program" emanates from decisions apparently motivated by concerns that:

- (i) persons occupationally exposed to asbestos-containing materials have such a compelling case for compensation that the issue of impairment should be relegated to one of secondary importance;
- (ii) compensation ought not be limited to workers' compensation;
- (iii) to assemble and effectuate the requisite compensation: (a) available insurance proceeds should be maximized irrespective of pol-

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United States) found asbestosis and pleural thickening in 65% of the workers screened. In contrast, the National Institute for Occupational Safety and Health has found asbestosis in recent studies in only 0.2% of tireworkers and pleural changes in 2.3%. *Id.* at 77.

Some of the techniques used by these attorneys to solicit cases and sell off percentages to others were related in the course of an opinion assessing them with a \$10 million punitive damage award in a dispute with one of their expert witnesses. *Olfacto Labs v. Crawford*, No. 639967-2, slip op. at 6 (Cal. App. Dep't Super. Ct. March 11, 1991) ("This court has never before experienced such deceit, willful disregard of client's protection and rights, overreaching in dealing with other attorneys, indifference to and avoidance of payments of business creditors, and outright disregard of the truth, whether under oath or not."); see also Todd Woody, *Judicial Blackmail Cost Firm \$10 Million*, S.F. LEGAL RECORDER, Mar. 18, 1991, at 7, 10. However, these attorneys have not yet been sanctioned for their fraudulent actions in soliciting tire-worker plaintiffs and participating in the creation of fraudulent medical evidence. Indeed, even while stating that the mass production of claims by these lawyers involved a "steady flow of faulty claims" based on a "professional farce" and were a "fraud on the court," *Raymark Indus. v. Stemple*, No. 88-1014-k, 1990 WL 72588, at \*2, \*18 (D. Kan. May 30, 1990), judges have failed to set aside the large settlements that were the fruits of the fraud. Several of the tire worker claims have been dismissed as unfounded. See, e.g., *Slaughter v. Southern Talc Co.*, 919 F.2d 304 (5th Cir. 1990) (dismissing 418 of 451 tireworker cases for lack of any symptoms of asbestos-related disease); *Raymark Indus. v. Stemple*, No. 88-1014-k, 1990 WL 72588 (D. Kan. May 30, 1990); *In re Ohio Asbestos Litig.*, Mardoc Order No. 38 (May 9, 1989) cited in *Aldock et al.*, *supra* note 39, at 13 (dismissing 678 maritime docket cases for lack of any evidence of asbestos-related injury); *In re Tire Worker Asbestos Litig.*, No. 88-4703, 1989 U.S. Dist. LEXIS 14717, at \* 6 (E.D. Pa. Dec. 6, 1989) (Judge Weiner noted that the Third Circuit's affirmance of his ruling dismissing claims based on a "fiber drift" theory could be expected to result in the elimination of 1000 cases from the court's docket). Some tireworker cases have, however, resulted in significant verdicts for plaintiffs. See, e.g., *Asbestos, MEALEY'S LITIG. REPORTS*, Feb. 2, 1990, at 11-12.

<sup>50</sup> To many, particularly those in other countries, it may seem strange that in the United States we leave it to individual courts to provide essentially ad hoc solutions to modern-day disasters with their national social and economic repercussions. In this country, however, three factors have, by default, left the state and federal courts to their own devices: (1) the lack to date of an effective national administrative regulatory scheme capable of controlling undesirable conduct by manufacturers; (2) the absence of a comprehensive social welfare-medical scheme for compensating victims of mass torts; and (3) the lack of adequate state or federal legislation controlling these cases.

Weinstein & Hershenov, *supra* note 5, at 270.

icy language;<sup>51</sup> (b) as many companies as possible that have ever manufactured, distributed, or used asbestos-containing materials should be held culpable, and, if necessary, to the full extent of their net worth; and, (c) successor liability laws be invoked so as to reach into the deeper pockets of the companies that bought far smaller entities

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<sup>51</sup> See, e.g., *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 951 (1982). The Keene Company, an asbestos defendant, was formed in 1967 and in 1968 purchased Baldwin-Ehret-Hill (BEH), a manufacturer of thermal insulation products, some of which contained asbestos. *Id.* at 1038 n.1. Its production of asbestos-containing products ceased in 1972. *Id.* at 1045 n.22. During the 1961 to 1981 period, Keene and BEH were insured under a number of insurance policies by several insurance companies. *Id.* at 1038. In *Keene*, the court addressed the interpretation of standard policy language; the policy provided liability coverage for sums that the insured became liable to pay as damages for bodily injury resulting during the policy period. *Id.* at 1039. Thus, the critical question was which of the asbestos-related injuries fell within which policy period. *Id.* at 1040. The court decided that the policies in force when persons were exposed to Keene's and BEH's products were available. *Id.* at 1044. Additionally, it decided that policies in force when the actual manifestation of injury occurred, were available. *Id.* The essential novelty of the case was the definition of injury in such a fashion so as to include a third trigger, the period between exposure and manifestation. *Id.* at 1058 (Wald, J., concurring).

This period of time included the substantial bulk of the insurance coverage—not only to Keene but most other asbestos defendants as well. Hence, the holding had enormous financial consequences. Under this “triple trigger,” insurance coverage was maximized so as to include *all* policies issued in the decade or score of years between the time of exposure and the time of injury. For Keene, this meant \$423 million of insurance coverage. See KEENE CORP., 1990 ANNUAL REPORT 4 (1991). For other “triple trigger” holdings, see *Casey Canada Inc. v. California Union Ins. Co.*, 748 F. Supp. 8 (D.D.C. 1990); *USF&G v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991); *Lac D'Amiante du Quebec, Ltd. v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985), *vacated as to one defendant*, 864 F.2d 1033 (3d Cir. 1988); *Owens-Illinois, Inc. v. United Ins.*, No. C5045-84 (N.J. Super. Ct. Div. Apr. 6, 1990). See also Robert G. Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 AM. U.L. REV. 285, 305 (1988); Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 HARV. L. REV. 739 (1984); Charles Maher, *Asbestos Extravaganza*, CAL. LAW., June 1985, at 60. See also *infra* note 269.

It is interesting to note that for purposes of amassing the largest possible amount of coverage for asbestos defendants, and hence for claimants, Judge Bazelon, writing for the court, found as a critical element in his decision that while Keene's coverage would not extend to “liability for injuries of which Keene could have been aware of prior to its purchase of insurance,” *id.* at 1044, Keene and BEH at the time of the exposure of claimants to its products “could not have been aware prior to its purchase of insurance” of the injuries to be caused by that exposure. *Id.* at 1046. Hence, Keene and presumably most other asbestos defendants did not know and could not reasonably have known of the injuries being sustained by those exposed to its products at the time of that exposure and even long thereafter according to Judge Bazelon. *Id.* at 1044. See also *infra* note 271.

For purposes, however, of accessing the pool of assets made available to claimants by *Keene*, Keene and most other asbestos defendants have been repeatedly found to have failed to provide adequate warnings of the dangers of asbestos exposure of which they knew or reasonably should have known at the time of exposure. For instance, in *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990), discussed *infra* note 188, the court's findings would have rendered much of Celotex's insurance coverage inaccessible, according to Judge Bazelon's holding.

that manufactured asbestos-containing materials regardless of the culpability of the purchasing companies;

(iv) punitive damages should be awarded to punish defendants and in some cases to accelerate payments to claimants before the funds available for compensation are depleted by payments to plaintiffs in other jurisdictions;<sup>52</sup> and

(v) defendants should be barred from raising as a defense in shipyard cases that: (a) during World War II, the United States government required contractors constructing ships to use asbestos-containing materials; and (b) the government knew of the hazards of exposure to asbestos in the workplace and made a conscious decision as part of the war effort not to inform shipyard workers of the hazards of asbestos and the need to take precautions, but is nonetheless immune from suit by the injured workers.

The resulting compensation scheme is funded by the largest pool of money ever assembled in the course of litigation (approximately

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<sup>52</sup> No jurist would acknowledge that he or she is using punitive damage awards as a vehicle for accelerating payments to claimants located in their jurisdiction. Indeed, punitive damage awards in asbestos cases are quite rare, although their incidence and relative importance is increasing. See *infra* notes 175-202 and accompanying text. In the federal Brooklyn Naval Yard cases, while damage awards in the Phase I cases were substantial—totalling \$30,659,658.80 for the 52 successful claimants (of the total 65 plaintiffs)—no punitive damages were awarded. *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1386 (E. & S.D.N.Y. 1991). In the state Brooklyn Naval Yard Cases which involved virtually identical sets of plaintiffs in virtually identical work settings during the same time period, and which were tried simultaneously, verdicts were more than three times higher than in the federal trial, and punitive damages were also awarded. *Id.* at 1387. By contrast, in *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990), punitive damage awards were enormous. See *infra* notes 245-60 and accompanying text for a more detailed account of *Cimino*. In asbestos litigation, if even one jurist uses punitive damages as a vehicle for claiming a larger share of the remaining assets for plaintiffs and their lawyers in one jurisdiction, subtle pressures are created on other jurists to compete for a share of the dwindling asset pool for deserving claimants in their jurisdiction. Judge Richard Neely stated:

No matter how responsible I or the other members of our courts want to be as state court judges, we are powerless to improve the overall American products liability system or reduce the exposure of West Virginia manufacturers to the caprice or malice of out-of-state courts and juries.

By trying unilaterally to make such improvements, we will succeed only in impoverishing our own state's residents without doing anyone, anywhere, any measurable good. Unless we want to be "suckers," as state judges we *must* immediately incorporate the latest pro-plaintiff wealth redistribution theories applied in other states into West Virginia's decisional law. If we conceive and apply new wealth redistribution theories before anyone else, we can even garner for ourselves more than our fair share of the national product liability insurance pool. Every jurisdiction then, *must* ultimately follow the most irresponsible state.

Testimony of Justice Richard Neely of the West Virginia Court of Appeals before the Senate Commerce Committee, Sept. 12, 1991, at 9-10 (on file with author).



seven to nine billion dollars),<sup>53</sup> the availability of which perversely effectuates the extension of eligibility for compensation to lesser impaired and non-impaired persons.<sup>54</sup> Moreover, in some jurisdictions, a further perverse effect is the creation of a national asbestos lottery wherein some claimants who roll the trial dice receive nothing while others, including substantial numbers of the unimpaired, hit the jackpot.<sup>55</sup> The perverse effects are driven by an overincentivized contingent-fee system, which has provided plaintiffs' attorneys with huge rewards—the more so as they have taken the compensation program to ends neither desired nor contemplated,<sup>56</sup> while imposing substantial costs on defendants. In recent years, caseloads have burgeoned—not because of an increase in the numbers of the seriously ill<sup>57</sup>—but rather because of the enormous incentives for plaintiffs to enter the lottery and the far more enormous incentives for plaintiffs' lawyers to obtain ever increasing numbers of claimants.<sup>58</sup>

#### A. *The Contingent-Fee Engine that Drives the Litigation*

The role of contingent fees in the creation of the asbestos-litigation crisis has substantially been ignored. Plaintiffs' attorneys charge contingent fees<sup>59</sup> in asbestos cases ranging from twenty-five to fifty percent of the gross amount of plaintiffs' award or settlement.<sup>60</sup> Their effective hourly rates in asbestos cases often exceed \$1,000; in some

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<sup>53</sup> This figure is an estimate based on awards to date and decisions involving insurance coverage. See *supra* note 51 and *infra* note 269.

<sup>54</sup> See *infra* text accompanying notes 138-44 and 170-74.

<sup>55</sup> See *infra* text accompanying notes 156-69.

<sup>56</sup> See *infra* text accompanying notes 59-79.

<sup>57</sup> See *infra* text accompanying notes 170-74.

<sup>58</sup> "There are gross abuses of our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent—we have untrammelled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong [and] should be stopped . . ." Remarks of Ronald L. Motley, in *Administrative Alternative*, *supra* note 3, at 15.

<sup>59</sup> Quite apart from asbestos litigation, contingent-fee abuses are common. For an analysis of contingent fees yielding hourly rates of return of \$1,994-\$3,000 despite the virtual complete absence of risk bearing, see Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 33 n.12 (1989) [hereinafter Brickman, *Contingent Fees*].

<sup>60</sup> In *In re Joint E. & S. Dists. Asbestos Litig.* (Findley v. Blinken), 129 B.R. 710, 867 (E. & S.D.N.Y. 1991), Judge Weinstein estimates the prevailing plaintiffs' attorneys' contingent-fee percentage in asbestos cases to be 33-45%. Information about contingent-fee rates is extremely hard to obtain. Most judges do not inquire, most plaintiffs lawyers do not disclose, and most defendants' lawyers do not know plaintiffs' attorneys' contingent-fee rates. See *infra* notes 63, 67-68 and accompanying text. On the basis of my inquiries, I estimate that fees range from 25-50%. 50% would appear to be common in Texas, 40% in Philadelphia, and 25-40% in New York. See also Dillon, *supra* note 29, at 43, reporting plaintiffs' attorneys setting fees at 33-40%.

cases, the hourly rates of return are greater than \$2,000 and can be as high as \$5,000 per hour.<sup>61</sup>

Judges have stated on numerous occasions that they have a spe-

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<sup>61</sup> To calculate these rates, which were determined with reference to Manville Trust Fund claims, I determined the average Trust Fund recovery and then reconstructed the amount of time that plaintiffs' attorneys devoted to each claim. Prior to the time the trust became insolvent, actual payments of \$677,445,619 were made to plaintiffs represented by counsel. *Findley*, 129 B.R. at 956-65. Of this aggregate payment, plaintiff's counsels' fees ranged from \$226,600,000-\$306,000,000, based on Judge Weinstein's estimate that the prevailing attorneys' fees ranged from 33-45%. *Id.* at 867. The average liquidated value of each claim amounted to \$42,128. *Id.* at 758. Despite the fact that claims were settled in groups of hundreds and thousands, "[n]o limit on [attorney] fees . . . was negotiated to reduce the Trust's payment." *Id.* at 756.

Even under the reorganized Manville Trust, where average awards were reduced to \$25,000 and plaintiffs' attorneys' fees were capped at 25%, plaintiffs' lawyers continued to average \$1,500 per hour, compared to the average defendants' lawyers rates of \$175 per hour. *See id.* at 863-64 (citing Testimony of Lester Brickman in Manville Fairness Hearing).

To be sure, these effective hourly rates of return do not take fee-sharing arrangements into account. Asbestos claims are actively traded by lawyers; the top ten plaintiffs' firms receive many of their asbestos cases by referral from other attorneys. *See Dillon, supra* note 29, at 43. Referral fees of 25-67% are common.

Motley hired local counsel through an unusual split-the-work, split-the-fee arrangement. . . . Motley's firm typically takes home only a third of the total lawyer's fees or even less, according to eight co-counsel. "The further the cases are from South Carolina," Motley explains, "the less we take."

*Id.* at 41.

Hence, the net return to the top firms for asbestos work would be as little as 50% of the hourly rates calculated. However, looked at from the perspective of the client (and of society), the calculated effective hourly rates of return ought not to be discounted. That the client pays a legal fee amounting to \$5,000 per hour is not ameliorated by the fact that several attorneys are dividing up the fee.

The following table is a list of the assumptions upon which I have based my hourly rate calculations. On the basis of these estimates, under the pre-reorganized Trust, assuming \$60 per hour for paralegal work and \$150 per hour for junior attorneys, the comparative handful of senior attorneys were compensated at the rate of a little less than \$5,000 per hour. Under the reorganized Trust, the effective senior attorney rate is \$2,750 per hour. I have used the considerably lower estimate of \$1,500 per hour to be conservative.

cial obligation to police contingent fees.<sup>62</sup> However, courts in asbes-

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ESTIMATED PER CASE TIME (IN HOURS) FOR PROCESSING MANVILLE TRUST CLAIMS

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Task	Old Trust	New Trust.
Business Development	(SA) .25	(SA) .25
Intake Interview	(SA) .25	(SA) .25
	(JA) .25	(JA) .25
	(P) 1.00	(P) 1.00
Collecting medical and workplace records	(P) 3.00	(P) 3.00
	(C) 1.00	(C) 1.00
Prepare and submit claim form	(C) .50	(C) .50
	(P) 1.00	(P) 1.00
	(JA) .50	(JA) .50
Negotiation and settlement process	(SA) 2.00	(SA) 1.00
	(JA) 2.00	(JA) 1.50
Prepare Closing Papers	(SA) .25	(SA) .50
Disburse Funds	(P) 1.25	(P) 1.75

(SA) = Senior Attorney

(JA) = Junior Attorney

(P) = Paralegal

(C) = Clerk

EXPLANATORY NOTES

a) This analysis assumes that processing a Manville claim bears no share of the tort-system time for the same case against other defendants. Therefore, it underestimates the hourly rate. The estimation also assumes that reaching a settlement with the new Trust is easier because the settlement numbers are largely predetermined while, because of the extended payment payout, closing the settlement will become more complicated.

b) Under the old Trust approximately one in ten claims would go into the tort system; current estimates are that it will be one in twenty. That case, with substantial attorney and paralegal time (twenty attorney hours and twenty-five paralegal hours up to but not including trial) would be allocated under the other cases.

c) This table assumes the attorney has a substantial number of cases and operates efficiently. Consider Dillon, *supra* note 29, at 42:

Like other high-volume personal injury firms, Ness, Motley handles its cases with factory-like efficiency. The firm relies heavily on paralegals to do much of the work that associates might do in another firm. "We are able to utilize good paralegals to do medical record reviews, drafting answers to interrogatories, medical research, and chasing down [plaintiff's] co-workers."

*Id.* (quoting Joseph Rice).

d) All medical expenses—including diagnosis and work done by medical professional and paraprofessional personnel—are paid out of the client's, not the lawyer's share of the proceeds.

<sup>62</sup> See, e.g., *In re Agent Orange Prod. Liab. Litig.* 818 F.2d 226 (2d Cir.), *cert. denied sub nom.* Schwartz v. Dean, 484 U.S. 926 (1987); *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green*, 778 F.2d 890, 896 (1st Cir. 1985); *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985) ("Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts."); *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983); *Allen v. United States*, 606 F.2d 432, 435 (4th Cir. 1979); *Dunn v. H.K. Porter, Co.*, 602 F.2d 1105, 1108 (3d Cir. 1979) ("Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as ordinary commercial contracts . . . courts have the power to monitor such contracts either through rule-making or on an ad hoc basis.") (citation omitted); *In re Michelson*, 511 F.2d 882 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975); *Schlesinger v.*

tos litigation have abdicated their responsibility to review contingent fees<sup>63</sup> and ensure that lawyers have not used their superior knowledge and experience to take undue advantage of clients.<sup>64</sup>

By charging contingent fees, lawyers are including a risk premium in the form of a multiplier of their hourly rate in their fee—the greater the risk, the greater the premium. Charging a premium for risk but not assuming any risk is not simply charging a grossly exorbitant fee; it is illegal and unethical as well.<sup>65</sup> In a mesothelioma or serious asbestosis case in which there is a clear history of occupational exposure as well as extensive evidence of product identification, there is no risk of nonrecovery.<sup>66</sup> To the contrary, a large recovery is assured. When an attorney charges a twenty-five to fifty percent contingent fee, an effective hourly rate of return of several thousand dollars an hour is also assured. Because of the significant abuses of contingent fees and the fact that very few courts in asbestos litigation are

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Teitelbaum, 475 F.2d 137, 141 (3d Cir.) (“[I]n its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees.”), *cert. denied*, 414 U.S. 1111 (1973); *York v. Alabama State Bd. of Educ.*, 631 F. Supp. 78, 87 (M.D. Ala. 1986); *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984); *Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. 1976); *Gruskay v. Simenaukas*, 140 A. 724 (Conn. 1928); *In re Teichner*, 470 N.E.2d 972, 983 (Ill. 1984) (citing *Pocius v. Halvorson*, 195 N.E.2d 137, 146 (Ill. 1963)); *Rosenthal v. First Nat’l Bank of Chicago*, 262 N.E.2d 262, 265 (Ill. 1970); *American Trial Lawyers Ass’n v. New Jersey Supreme Court*, 330 A.2d 350 (N.J. 1974); *In re Cohen*, 199 N.Y.S.2d 658, 663 (1960); *Lewis v. Morgan*, 28 A.2d 215, 217 (N.Y. App. Div. 1960), *aff’d*, 374 U.S. 857 (1963); *In re Estate of Thompson*, 232 A.2d 625 (Pa. 1967).

<sup>63</sup> Most asbestos jurists are not aware of the contingent-fee rates charged by plaintiffs’ lawyers; indeed, most never request such information. At the oversight hearings on asbestos litigation before the Subcommittee on Intellectual Property and Judicial Administration of the House Judiciary Committee held on October 24, 1991, several asbestos jurists testified that they neither knew nor inquired into the contingent-fee rates being charged by plaintiffs’ counsel. For a rare occasion where such a request was made, see *Conway v. Asbestos Corp.*, No. 81 C 3220, 1991 WL 195800 (N.D. Ill. Sept. 23, 1991) stating:

[T]his court has been much troubled by the fact that it has been given no information at all about the relationship between the total fees received and the total time expended by plaintiffs’ lawyers in the numerous asbestos cases that they are handling . . . this Court has been entirely frustrated in its several requests for such information. Even though the plaintiffs’ lawyers with a large portfolio of such cases surely have the information readily retrievable from their time records, they have never been forthcoming with the facts—instead their submissions in response to this Court’s inquiries regularly talk about everything except what this Court has asked.

*Id.* at \*1.

<sup>64</sup> See Lester Brickman, *Lawyer’s Fee Frenzy*, WASH. POST, Aug. 16, 1991, at A29.

<sup>65</sup> Brickman, *Contingent Fees*, *supra* note 59, at 34.

<sup>66</sup> A risk peculiar to asbestos cases is a post-verdict pre-collection bankruptcy of a defendant. The degree of risk depends upon the percentage of liability assigned to that defendant in the cases in question, the solvency of the particular defendants, and whether the verdicts have been bonded.

even aware of what rates lawyers are charging,<sup>67</sup> jurists should require that contingent fee retainer agreements be disclosed to the court.<sup>68</sup>

Although requiring fee disclosure is but one step in the superintending process, it is a most salutary one. One effect of disclosure would be to arm claimants with the knowledge that could induce bargaining. Moreover, as observed by Judge Jack Weinstein: "Since many attorneys have received their cases as a result of union favor, the unions are in a position to intervene on behalf of their members in insisting on lower fees."<sup>69</sup>

Unfortunately, no such fee bargaining on behalf of union members has occurred, even though such bargaining could be expected to yield contingent-fee rates of less than twenty percent and in some cases, ten percent or less.<sup>70</sup> The overincentivized contingent-fee engine generates tens of thousands of unimpaired cases,<sup>71</sup> results in lawyers overreaching clients, massively overcompensates some lawyers,<sup>72</sup>

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<sup>67</sup> See *supra* notes 60 and 63.

<sup>68</sup> In *Conway v. Asbestos Corp.*, No. 81 C 3220, 1991 WL 195800 (N.D. Ill. Sept. 23, 1991), the plaintiff's attorney refused to provide the court with information regarding the hours expended on the case even after numerous requests. *Id.* at \*1. Judge Milton Shadur reject[ed] each of the pending applications for fees in its entirety. In every instance the settling defendant is only a minor contributor to the total fees realized to date from all defendants, and it appears most likely that the plaintiffs' attorneys will already have been more than handsomely compensated even if they receive nothing at all out of the current incremental recovery.

*Id.* at \*2.

<sup>69</sup> *In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken)*, 129 B.R. 710, 868 (E. & S.D.N.Y. 1991); see also *Raymark Indus. v. Stemple*, No. 88-1014-k, 1990 WL 72588, at \*9 (D. Kan. May 30, 1990).

<sup>70</sup> Cf. Brickman, *Contingent Fees*, *supra* note 59, at 109, 121 n.366.

<sup>71</sup> See *supra* note 58.

<sup>72</sup> See *supra* note 60. My conclusions regarding effective hourly rates of return in excess of \$1000 per hour as related in my Manville testimony and the paper prepared for the Administrative Conference Colloquy have been widely circulated. Interestingly no plaintiff's lawyer in the asbestos litigation has come forward to dispute the essential accuracy of my calculations. Instead, I have been criticized for failing to criticize defendants' lawyers' fees in asbestos litigation (which I have calculated to average \$175 per hour) and for failing to acknowledge the indispensable role of contingent fees in funding asbestos litigation. It is not the use of contingent fees in asbestos litigation that I criticize, but the abuses; that is, the virtual complete failure of the courts to exercise superintendence, charging substantial contingent fees in circumstances where there are no contingencies, and, in any event, charging contingent-fee percentages that yield enormous hourly rates of return which are simply not justifiable by the risks being assumed.

Defendants' lawyers billing practices also reflect substantial abuses. See *infra* note 263; see also *Report*, *supra* note 1, at 12-13 (description of federal court trial in Cleveland involving four plaintiffs and forty-one to fifty-eight lawyers which was estimated to have generated transaction costs of between \$3 million and \$7 million). Most of these billing abuses, however, are much less a matter of concern than those inflicted on plaintiffs. Asbestos defendants are (by now) highly sophisticated consumers of legal services. With monthly billings for asbestos litigation defense for the top ten asbestos defendants ranging from \$1 million to over \$10 million

and engenders judicial ignorance of contingent-fee rate setting. Indeed, the contingent-fee engine<sup>73</sup> that drives asbestos litigation is so powerful that court rules designed to set maximum contingent-fee rates are often simply ignored.<sup>74</sup> In addition to enormous effective

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defendants have a substantial incentive to closely monitor lawyers' billing practices and are, indeed, doing so.

Most defendants with active caseloads have instituted a sophisticated regime of fee billing oversight. The need for such a system is made apparent when one examines a typical monthly bill from a single law firm. Assuming six or more active on-going trials, the bill might total \$400,000. The bill will consist of more than 100 pages of densely filled computer print-out with thousands of entries representing each individual component of the bill; for example, R.K. (a lawyer's initials), 10/21/91 (date), 0.3 (hours), review interrogatories (task), \$78.00 (at R.K.'s billing rate of \$260 per hour). Also identified will be the case name and the file number. From the perspective of a reader seeking fee billing practice information, the bill is unreadable. To cope with "unreadable" bills, defendants have devised software packages which they provide to their attorneys. All services provided by the firm are classified into categories; for example, attending depositions, consulting witnesses, legal research. The provider of the service is listed both by name and by classification; for example, senior attorney, junior attorney, paralegal, clerk. Thus, each task being billed in a case is broken down into discrete components including the nature of the provider. The resultant categorizations easily exceed 50 and could be as high as 70. For example, some defendants have established the following gross billable time divisions: initial response, discovery, depositions, settlement, pre-trial preparation, trial and administrative. Each division is subdivided into three to nineteen categories. Thus, "depositions" are subdivided into the following: preparation of medical expert, co-worker, injured plaintiff, spouse or other relative, economic expert, other expert; and attendance at or conduct of these prepared-for depositions. Hence there are twelve deposition time-charge categories.

Requiring that bills be submitted in this form enables a defendant's computer to read the bill and provide critical information. For example, monitoring can reveal that: (1) senior partners are doing work that associates do in other firms—that is, the number of overqualified hours; (2) fifty attorney hours for a deposition exceed the norm established by a comprehensive analysis of that defendant's total billings; (3) six lawyers are working on a matter while most of the other firms retained by that defendant are using three (on average, the higher the number of attorneys working for a client, the higher the billings will be per matter regardless of the intrinsic "work value" of the various matters); and, (4) one law firm's average defense costs for an "all issues" trial is \$100,000 whereas other firms retained by that same defendant average \$40,000 and there is no offsetting difference in outcomes.

Defendants are thus exercising increasingly sophisticated controls over their litigation costs—their incentives to do so being clear. In reality, only courts can monitor plaintiffs' attorneys' fees. If they eschew this responsibility, as is currently the case, obviously no one else will perform the monitoring function.

<sup>73</sup> Weinstein & Hershenov, *supra* note 5, at 326 ("The contingent fee system, the payment of attorneys' fees to the victor and other aspects of our legal system have helped fuel the system.").

<sup>74</sup> See, e.g., N.J. CIV. PRACTICE R. 1:21-7(i) which provides, in pertinent part:

When representation is undertaken on behalf of several persons whose respective claims, whether or not joined in one action, arise out of the same transaction or set of facts or involve substantially identical liability issues, the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries . . . and shall be charged to the clients in proportion to the recovery of each.

*Id.*

Vast savings would result if, as the New Jersey Rule provides, contingent fees were applied on the aggregate amount in a mass settlement. For example, if 100 plaintiffs with the

hourly rates of return and the resultant perverse incentive structure, the asbestos-litigation crisis also emanates from (i) explicit rulings creating different substantive law for asbestos cases;<sup>75</sup> (ii) evidentiary rulings and appellate opinions upholding these rulings which appear to be the products of a "there is law and there is asbestos law" doctrine;<sup>76</sup> (iii) allowing pleural plaque and other unimpaired claims and the attendant lottery despite alternative disposition methods;<sup>77</sup> (iv) uncorking the punitive damages genie and then decrying the inability to force that genie back into the bottle;<sup>78</sup> and (v) mass consolidations of asbestos claims into mega-cases involving hundreds and even thousands of claims.<sup>79</sup>

### B. *A Separate Law for Asbestos Cases*

The New Jersey Supreme Court has created a separate law for asbestos cases.<sup>80</sup> In *Beshada v. Johns-Manville Products Corp.*,<sup>81</sup> the

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most serious forms of asbestos disease reached a settlement with five defendants that provided for an aggregate payment of \$24 million (or \$240 thousand for each plaintiff), under N.J. CIV. PRACTICE R. 1:21-7(c) which limits contingent fees to 33 1/3% on the first \$250,000, 25% of the next \$250,000, and 20% on the excess of \$250,000, the contingent fee on the aggregate amount would be \$8 million. However, if the fees are calculated pursuant to Rule 1:21-7(i), which would take into account the aggregate nature of the mass settlement, the total fee would be \$4,845,833—which would be 39% less.

Yet, Rule 1:27-7(i) is routinely ignored by New Jersey plaintiffs' attorneys and goes unenforced by the courts in asbestos cases. For an analysis of societal attempts to regulate attorney fees and the legal profession's steadfast and generally successful opposition, see Lester Brickman & Jonathan Klein, *Use of Advance Fee Retainer Agreements in Bankruptcy: Another Special Law For Lawyers?*, 43 S.C. L. REV. (forthcoming 1992).

<sup>75</sup> See *infra* notes 80-137 and accompanying text.

<sup>76</sup> In the following pages, I set out to substantiate this hypothesis. The case discussions presented are not intentionally exhaustive but merely illustrative.

<sup>77</sup> See *infra* notes 138-69 and accompanying text.

<sup>78</sup> See *infra* notes 175-202 and accompanying text.

<sup>79</sup> See *infra* notes 230-65 and accompanying text.

<sup>80</sup> There are occasions when new substantive law must be created to deal with asbestos litigation. As a consequence of the federal Brooklyn Naval Yard cases (discussed *infra* notes 236-40), it became necessary to determine how the verdicts would be molded into judgments—specifically how to determine the impacts of the settling defendants and the percentage of respondent's liability allocated to the Manville Personal Injury Settlement Trust created by the Manville Bankruptcy, on the calculation of the amounts due from the non-settling defendants under New York state law. "The process of translating the jury verdicts into judgments in New York is governed by an extremely complex statutory scheme." *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1384 (E. & S.D.N.Y. 1991). However, "[t]he effect and meaning of many of the provisions [recently enacted by New York] remains uncertain." *Id.* Judge Weinstein's molding of the verdicts involves computational difficulties that would make the eyes of an advanced civil procedure law school class glaze over. See also Record of Proceedings before Justice Helen E. Freedman at 6170-85, *In re New York City Asbestos Litig.*, (N.Y. Sup. Ct. Feb. 25, 1991) (No. 40000/88). "New York has had no asbestos cases. We are making the law in this case." *Id.* at 6182.

<sup>81</sup> 447 A.2d 539 (N.J. 1982).

court held that in asbestos cases and *only* in asbestos cases,<sup>82</sup> the state-of-the-art defense asserted by defendants—that at the relevant times they did not know and could not have known of the danger of their products—would not be allowed.<sup>83</sup> By deeming culpability irrelevant and imposing liability without fault, the court presumed, as a matter of policy, that manufacturers would become more careful.<sup>84</sup> Yet, under *Beshada*, not only is a manufacturer liable for injury resulting from the use of its products regardless of what it learns about the product's potential hazards, but the manufacturer continues to be liable for hazards about which it could not have learned of at the time of manufacture. Hence, incentives to improve product safety could be reduced, and the costs of introducing new products raised by the delays inherent in searching for all information as to possible hazards, including the information about which it could not have learned.<sup>85</sup>

Appellate opinions arguably applying a "there is law and there is asbestos law" doctrine can be found. For example, in *O'Brien v. National Gypsum*,<sup>86</sup> the Second Circuit affirmed a judgment that awarded wrongful death damages against the Celotex Corporation. There was no direct evidence of exposure to defendant's specific products; rather the evidence in support of exposure to Celotex and Raymark products was circumstantial<sup>87</sup> and hearsay. The main issue

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<sup>82</sup> For instance, the New Jersey Appellate Division has refused to apply the *Beshada* rule to a strict products liability action regarding prescription drugs:

In areas involving public health there are weighty policy considerations on both sides of any question as to whether strict liability should be applied. . . . Admittedly, *Beshada* speaks in broad terms, but absent a direct expression that prescription drug type cases are no longer to be separately treated we do not, nor can we, regard *Beshada* as effecting a policy change of such dimension.

*Feldman v. Lederle Labs.*, 460 A.2d 203, 208-09 (N.J. Super. Ct. App. Div. 1983); see also Andrew T. Berry, *Beshada v. Johns-Manville Products Corp.: Revolution—or Aberration—in Products Liability Law*, 52 FORDHAM L. REVIEW 786, 791 (1984) ("*Beshada* is understood best not as a products liability case, but as an asbestos case."). Asbestos litigation is a substantial industry in New Jersey as is the manufacture of ethical drugs. See generally N.J. SUCCESS, Apr. 1985, at 1 (discussing ethical drug industry in New Jersey).

<sup>83</sup> *Beshada*, 447 A.2d at 546.

<sup>84</sup> The court also supported its ruling with the rationale that strict liability promotes risk-spreading. *Id.* at 547-48.

<sup>85</sup> Berry, *supra* note 82, at 793-95.

<sup>86</sup> 944 F.2d 69 (2d Cir. 1991).

<sup>87</sup> The use of circumstantial evidence as a substitute for direct evidence that the claimant had worked with, or in proximity to, a defendant's products is widespread in asbestos litigation. Indeed, the circumstantial evidence relied upon to inculcate the largest possible number of defendants often appears to be quite weak; restrictions on jury speculation on proximate cause issues appears to be minimal if not nonexistent in asbestos litigation. Typically, a plaintiff and his witnesses will identify the products of several of the traditional asbestos defendants as those with which he worked or was in proximity to. Often, most of the defendants so identified will settle before verdict. The problem arises with regard to the other named traditional defendants. When a plaintiff is unable to testify that he worked with or in proximity to a



on appeal therefore, was whether the testimony of the plaintiff's witnesses should have been excluded as hearsay and whether the failure to do so was reversible error.<sup>88</sup> Unless the plaintiff, who had settled with more than a score of defendants, could show that her husband had been in contact with the defendants' products, she could not prevail in the remaining action.

Although the Second Circuit agreed that the circumstantial evidence was hearsay and should have been excluded, the court did not reverse the outcome, finding that the jury could have reached its conclusion without reliance on the circumstantial hearsay evidence.<sup>89</sup> According to the court, since the deceased had contracted mesothelioma<sup>90</sup> which "is caused only by exposure to asbestos,"<sup>91</sup> and the deceased's only known exposure to asbestos was during his one-year tenure as an apprentice in the Brooklyn Navy Yard and since Celotex's products were in use in the Yard, then the jury could have reasonably concluded, independently of the circumstantial hearsay evidence, that Celotex's products were one of the contributing causes to the development of mesothelioma.

However, the court's conclusion is not a scientifically clearcut proposition. There is doubt that the predominant form of asbestos causes mesothelioma;<sup>92</sup> moreover, exposure to asbestos is not the only

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particular defendant's products—that defendant being one or more of a score of defendants—and co-worker testimony is that they had seen that defendant's product in use somewhere at the work site, a jury's inference that the plaintiff worked in sufficient proximity to that defendant's products to cause injury to plaintiff is held to be sufficiently supported by the circumstantial evidence. *See, e.g.,* *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 172-73 (5th Cir. 1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1286 (2nd Cir.), *cert. denied*, 111 S. Ct. 297 (1990); *Whately v. Armstrong World Indus.*, 861 F.2d 837 (5th Cir. 1989); *Lockwood v. A.C. & S., Inc.*, 744 P.2d 605 (1987) (en banc); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984), *reh'g en banc on different grounds granted*, 750 F.2d 1314 (1985), *aff'd*, 781 F.2d 394 (1986). The reliance on circumstantial evidence to substitute for lack of direct evidence that a particular plaintiff had been exposed to that particular defendant's products as a means of inculcating the largest possible number of defendants must be understood in light of witness recollections regarding product exposure that seem to be vitally affected by the solvency of the particular defendants in question. *See supra* text accompanying note 14.

<sup>88</sup> *O'Brien*, 944 F.2d at 73.

<sup>89</sup> For rejection of the use of circumstantial evidence—that is, that specific asbestos-containing products were in use at the worksite where plaintiff was employed, as a substitute for proof that the plaintiff worked on a regular basis in proximity to where the product was used, see *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985). The Fourth Circuit held likewise in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), but then almost immediately receded from its position in, *Roehling v. National Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225 (4th Cir. 1986).

<sup>90</sup> *See supra* note 24.

<sup>91</sup> *O'Brien*, 944 F.2d at 73.

<sup>92</sup> Asbestos exists in a fibrous form. Among the fiber types are crocidolite (blue asbestos) and chrysotile. Chrysotile is widely found throughout the United States and Canada and accounts for approximately 95% of asbestos mined and used commercially. *See* Editorial, *Min-*

known cause of mesothelioma.<sup>93</sup> Other environmental agents can cause mesothelioma,<sup>94</sup> including radiation therapy,<sup>95</sup> naturally occurring and manmade mineral fibers such as zeolite (fibers of volcanic origin)<sup>96</sup> and glass fibers,<sup>97</sup> Cumming-ton-grunerite,<sup>98</sup> organic chemi-

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*eral Fibres and Mesothelioma*, 41 THORAX 161 (1986); crocidolite is imported from South Africa, see 2 ENCYCLOPAEDIA BRITANNICA 559 (1966). Many scientists believe that chrysotile asbestos is incapable of causing mesothelioma; others have suggested that it is crocidolite alone which is responsible for the development of mesothelioma. See A.R. Gibbs et al., *Non-Occupational Malignant Mesothelioma*, 90 IARC SCIENTIFIC PUBLICATIONS 219-28 (1989); Brooke T. Mossman & J. Bernard L. Gee, *Asbestos-Related Diseases*, 320 NEW ENG. J. MED. 1721, 1727 (1989); J.C. Wagner, *The Discovery of the Association Between Blue Asbestos and Mesotheliomas and the Aftermath*, 48 BRIT. J. OF INDUS. MED. 399-403 (1991), cited in DEFENSE RESEARCH INST., THE 1991 ASBESTOS MEDICINE SEMINAR A-14 to A-15 (Oct. 16-18, 1991). In one case, the circuit court reversed in part a district court's order which estopped the parties from litigating the medical causation issue, including the determination that asbestos causes mesothelioma; rather the circuit court maintained that it is a "disputed issue" whether "mesothelioma [can] arise without exposure to asbestos." *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347-48 (5th Cir. 1982), *rev'g in part*, 509 F. Supp. 1353 (E.D. Tex. 1981).

<sup>93</sup> Gunner Hillerdahl, *Pleural Lesions in Crocidolite Workers from Western Australia*, 47 BRIT. J. INDUS. MED. 782-83 (1990). Twenty percent of men with malignant mesothelioma have no history of exposure to asbestos. Mossman & Gee, *supra* note 92, at 1721, 1723. In a review of 123 patients diagnosed with malignant pleural mesothelioma, Sloane-Kettering Cancer Center researchers found that only 16 patients related a history of exposure to asbestos. Fourteen of the patients had a history of previous lung disease; one had received prior radiation, and fourteen had been exposed to industrial dusts and chemicals. Joseph Brenner et al., *Malignant Mesothelioma of the Pleura, Review of 123 Patients*, 49 CANCER 2431, 2431-32 (1982). This finding, that not all pleural mesotheliomas are related to asbestos is consistent with a review of the literature that from 10-70% of patients with malignant mesothelioma had been exposed to asbestos. Karen Hamm Antman, *Malignant Mesothelioma*, 303 NEW ENG. J. MED. 200, 200-02 (1980). In a review of malignant peritoneal mesothelioma, the Sloan-Kettering team found no evidence of asbestos linkage. Joseph Brenner et al., *Malignant Peritoneal Mesothelioma—Review of 25 Patients*, 75 AM. J. GASTROENTEROLOGY 311, 311-12 (1981). In a review of seven cases in which children had been inflicted with mesothelioma, six of the pleura and one of the peritoneum, none of the patients related a history of exposure to asbestos. Joseph Brenner et al., *Malignant Mesothelioma in Children: Report of Seven Cases and Review of the Literature*, 9 MED. & PEDIATRIC ONCOLOGY 367, 367-73 (1981).

<sup>94</sup> A. Phillippe Chahanian et al., *Diffuse Malignant Mesothelioma*, 96 ANNALS OF INTERNAL MED. 746, 752 (1982); Jack T. Peterson et al., *Non-Asbestos-Related Malignant Mesothelioma: A Review*, 54 CANCER 951 (1984) (the occurrence of large numbers of apparently non-asbestos-related malignant mesotheliomas has led researchers to suggest other environmental agents).

<sup>95</sup> Y. Izzettin Baris et al., *Environmental Mesothelioma in Turkey*, 330 ANNALS N.Y. ACAD. SCI. 423 (1979); Richard J. Stock, et al., *Malignant Peritoneal Mesothelioma Following Radio-Therapy for Seminoma of the Testes*, 44 CANCER 914, 914-19 (1978).

<sup>96</sup> Y. Izzettin Baris et al., *An Outbreak of Pleural Mesothelioma and Chronic Fibrosing Pleurisy in the Village of Karain/Urgup in Anatolia*, 33 THORAX 181, 192 (1978).

<sup>97</sup> Carlton, *Toxicity of Mineral Fibers*, INSULATION, Apr. 1982, at 32-36; Stanton & Wrench, *Mechanisms of Mesothelioma Induction with Asbestos and Fibrous Glass*, 48 J. OF NAT'L CANCER INST. 797 (1972).

<sup>98</sup> Terence C. Clark et al., *Respiratory Effects of Exposure to Dust In Taconite Mining and Processing*, 121 AM. REV. RESPIRATORY DISEASE 959, 966 (1980).

cals such as ethylene oxide,<sup>99</sup> mineral oil, and liquid paraffin.<sup>100</sup> Given that the deceased worked only one year in the Naval Yard and several score years in other locations, the circumstantial hearsay evidence was a critical factor in the case.

What is apparent in *O'Brien* is that a worker occupationally exposed to asbestos-containing materials contracted mesothelioma, a fatal disease usually resulting from asbestos exposure, and his family could maximize compensation only if every possible asbestos defendant were required to contribute. In the absence of a market-share allocation,<sup>101</sup> other means of enforcing contribution become necessary. Because applying conventional rules of evidence would not likely maximize compensation, the rules had to be modified.<sup>102</sup> Thus, the *O'Brien* court legitimized the use of circumstantial hearsay evidence to fill a significant gap in many asbestos cases.<sup>103</sup> But in adjusting the rules of evidence to meet the exigencies of asbestos cases, that is, in creating a result-driven evidentiary regime, the court failed to create a substitute circumstantial hearsay evidence rule for application to less seriously injured and uninjured claimants to replace the one discarded in a case where the fullest compensation award seemed merited even if not all defendants were likely culpable.<sup>104</sup> Once appellate courts demonstrate a willingness to tolerate what are effectively different rules of evidence for asbestos cases,<sup>105</sup> trial courts inclined by factors already enumerated to be sympathetic,<sup>106</sup> were quick to pursue the license granted to assure and maximize awards.

An example of asbestos litigation writ large at the trial court level is *Dunn v. Owens-Corning Fiberglas*.<sup>107</sup> *Dunn* typifies in many respects what is occurring today in asbestos litigation both in terms of its essential facts and the nature of the evidentiary rulings.

The typical asbestos trial consists of three parts: (i) medical injury; that is, plaintiff seeks to prove that he has been injured by expo-

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<sup>99</sup> NAT'L INST. ORG. SAFETY & HEALTH, ETHYLENE OXIDE: EVIDENCE OF CARCINOGENICITY, CURRENT INTELLIGENCE BULLETIN No. 35 (May 22, 1981).

<sup>100</sup> Peterson et al., *supra* note 94, at 955.

<sup>101</sup> See *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (formulating market share causation rule); but see *In re Related Asbestos Cases*, 543 F. Supp. 1152 (N.D. Cal. 1982) (rejecting market share allocation of liability in asbestos cases); *Celotex v. Copeland*, 471 So. 2d 533 (Fla. 1985) (same).

<sup>102</sup> See *supra* note 27.

<sup>103</sup> See *supra* note 87; cf. *supra* note 46.

<sup>104</sup> Defendants "who pay may or may not be liable compared to the [defendants] . . . who don't pay . . ." Transcript, *supra* note 32, at 6.

<sup>105</sup> See *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1286 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990). *Johnson* is discussed *infra* note 188.

<sup>106</sup> See *supra* text accompanying notes 23-27.

<sup>107</sup> 774 F. Supp. 929 (D. V.I. 1991).

sure to asbestos-containing products;<sup>108</sup> (ii) product identification, that is, plaintiff seeks to prove that the asbestos-containing materials he was exposed to were manufactured by the defendant; and (iii) product defect, that is, plaintiff seeks to prove that warnings on the products in question were nonexistent or inadequate while defendants assert product information was consistent with the level of scientific knowledge at the time of manufacture regarding the hazards of exposure to asbestos-containing materials (the "state-of-the-art" defense).<sup>109</sup> Plaintiff may also seek to introduce documents that were discovered in this and prior cases which counter defendants' state-of-the-art defense and which demonstrate that defendant was a bad actor.<sup>110</sup>

As is typical in asbestos cases, the plaintiff in *Dunn* sued numer-

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<sup>108</sup> Often, asbestos trials are bifurcated, that is, trial on the issue of product identification is separated from trial on the issue of medical injury. Reverse bifurcation provides for the issues of injury and medical causation to be tried before the issues of product identification, state-of-the-art defense, and punitive damages. The purpose of reverse bifurcation is to induce settlement by fixing the dollar value of the injury before determining liability, thereby substantially eliminating one of the principal uncertainties in the settlement process. "The decision to bifurcate is within the discretion of the trial judge." *Celotex*, 899 F.2d at 1289; see also *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 283 (2d Cir.), cert. dismissed, 111 S. Ct. 27 (1990); *In re Master Key Antitrust Litig.*, 528 F.2d 5, 14 (2d Cir. 1975).

<sup>109</sup> The irony of the contentious state-of-the-art defense—and its central issue of whether defendants issued appropriate warnings at appropriate times—is that warnings would not likely have made any difference in workers' use of asbestos-containing products, especially in the various shipyards during World War II. Massive injuries would still have occurred and the need to compensate the injured would still exist. Presumably, in the event that warnings were listed on product containers, they would either have been found inadequate or the legal regime constructed to provide compensation would have differed. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1082 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *BRODEUR*, *supra* note 6, at 61.

<sup>110</sup> Live-witness testimony is also presented, to the same effect. The case against each of the defendants varies according to the nature of the live-witness testimony available against that defendant and the availability of documents. Different plaintiffs' lawyers have amassed different sets of documents for use against different defendants. These documents have become a form of currency. Claims are traded, bartered, and sold by plaintiffs' lawyers in an active secondary market. An attorney who has, through previous discovery, amassed effective documents against defendant *A* may be brought into a case in which *A* is a nonsettling defendant in exchange for a percentage of the fee; or he may simply buy up cases in the secondary asbestos-claims market in which *A* is a non-settling defendant. The documents used against the defendants vary considerably; some are highly inculpatory—describing attempts in the 1930s to 1950s to prevent information from being released regarding the harmful effects of asbestos exposure. By routinely refusing to sever trials, introduction of documentary evidence against defendant *B*, often results in higher awards against other defendants in that same trial. See *supra* note 19. Even if defendant *B* has settled, these same documents are sometimes allowed into evidence and used against defendants who were not involved in such suppression, sometimes by showing that these defendants were members of the same trade associations as the highly culpable defendants or sometimes as part of plaintiff's response to defendants' state-of-the-art defense. Other admitted documents have little or nothing to do with what a defendant knew about the hazards of asbestos at a particular time and relate activities that while irrele-

ous defendants and settled with most prior to trial.<sup>111</sup> Owens-Corning Fiberglas was the only defendant remaining at trial.

Plaintiff asserted that he suffered from asbestos-induced lung disease, that is, asbestosis.<sup>112</sup> Consequently, he maintained that he was no longer able to work as an insulator, and, because he suffered shortness of breath, could no longer partake in athletic activity.<sup>113</sup> Plaintiff's medical experts testified that plaintiff had pleural plaques and asbestosis.<sup>114</sup> Defendant's expert witnesses contended that although

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vant to the trial issues are nonetheless admitted and used in argument to paint the defendant as a bad actor deserving of punishment. See *supra* notes 10-11.

<sup>111</sup> Settlements were also not reached with Celotex and Johns-Manville which had entered bankruptcy proceedings after the filing of the claim. Typically, the prior settlements provide financing for the suits against the nonsettling defendants.

<sup>112</sup> Asbestosis, which generically is a pneumoconiosis, that is, one of the "dust diseases," is a scarring of lung tissue caused by the inhalation of respirable asbestos fibers. WEBSTER'S DICTIONARY 906 (9th ed. 1988). Scarring of the lung tissue from any cause is referred to as interstitial or parenchymal fibrosis. This scarring can result from hundreds of causes and is not identifiable as to cause based solely on x-ray. An absolutely definitive diagnosis of asbestosis can only be made by histological examination of the actual lung tissue and a finding of discrete foci of fibrosis in the walls of the respiratory bronchioles associated with the accumulation of asbestos bodies. However, since biopsies are an invasive procedure and are rarely justifiable, a substitute for a pathological determination is a clinical diagnosis of asbestosis based upon chest x-rays demonstrating interstitial fibrosis plus a sufficient asbestos exposure history. Thus, the clinical diagnosis is one which seeks to ascribe a cause for fibrosis based upon exposure to asbestos even though the x-ray data is consistent with hundreds of possible causes. However, additional x-ray data may be of use. Though it is common to have pleural changes without asbestosis, asbestosis is frequently accompanied by characteristic pleural changes. A finding of pleural changes, along with x-ray evidence of interstitial fibrosis, helps differentiate asbestos-related interstitial fibrosis from other forms of lung scarring.

Asbestosis in its mildest form causes no breathing impairment and is detectable only on chest x-ray. In more severe stages, asbestosis may have a substantial impact on the efficiency of the lungs to perform and is progressive and debilitating; most cases of asbestosis, however, are nondebilitating and the majority do not progress. In cases of moderate or severe asbestosis, a restrictive breathing impairment may develop, which can be detected by the use of pulmonary function tests. This is due to the scar tissue replacing functional interstitial lung tissue, that is, air sacs, as well as making the lung itself less elastic. Asbestosis may also impair the gas exchange mechanism, which can be detected by diffusion capacity and arterial blood gas tests. Clinically, the patient may present with fatigue, nonproductive cough, and shortness of breath made worse by exercise. Fine dry rales, or crackles, may be heard at the base of one or both lungs. As the disease progresses, finger clubbing and cyanosis may appear. The most severe cases of asbestosis result in partial or total disability, respiratory failure and death. See John E. Craighead et al., *The Pathology of Asbestos-Associated Diseases of the Lungs and Pleural Cavities: Diagnostic Criteria and Proposed Grading Scheme*, 106 ARCHIVES OF PATHOLOGY & LAB. MED. 554, 559 (1982); ALFRED P. FISHMAN, PULMONARY DISEASES AND DISORDERS I, 764-65, 837-844 (2d ed. 1988); American Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestosis*, 134 AM. REV. RESPIRATORY DISEASE 363-68 (1991); Irving J. Selikoff et al., *Asbestos Exposure and Neoplasia*, 188 JAMA 142 (1964); see also *In re Joint E. & S. Dists. Asbestos Litig.* (Findley v. Blinken), 129 B.R. 710, 740 (E. & S.D.N.Y. 1991).

<sup>113</sup> *Dunn v. Owens-Corning Fiberglas*, 774 F. Supp. 929, 934, 937 (D. V.I. 1991).

<sup>114</sup> *Id.* at 936-37.

plaintiff had pleural plaques, he did not have asbestosis and had not been harmed.<sup>115</sup> Defendant presented evidence that plaintiff continued to work full-time and led a physically-active life.<sup>116</sup> Presiding Judge Constance Baker Motley, sitting by designation, acknowledged that "it is undisputed that plaintiff presently works full time and that he continues to lead a somewhat active life."<sup>117</sup>

The jury awarded \$1,300,000 in compensatory damages and \$25,000,000 in punitive damages, remitted by Judge Motley to \$500,000 in compensatory damages and \$2,000,000 in punitive damages.<sup>118</sup>

As in *Dunn*, the disputed medical diagnosis of asbestosis<sup>119</sup> is a frequent occurrence in asbestos litigation. Defendants' experts often argue that plaintiff, at most, has pleural plaques and is unimpaired while plaintiffs' experts always testify that the plaintiff is impaired and has asbestosis.<sup>120</sup> That places the decision in the hands of the jury<sup>121</sup> which is often predisposed, or at least convinced, to favor the interests of the worker-claimant against the corporate defendant.<sup>122</sup> If the

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 937-38.

<sup>117</sup> *Id.* at 938.

<sup>118</sup> *Id.* at 951.

<sup>119</sup> See *supra* note 112.

<sup>120</sup> See Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991). "It became apparent [in asbestos cases] that the plaintiffs had available a group of experts who always found asbestosis. They were countered by a group of defendant experts who rarely if ever found asbestosis." *Id.* at 38. To combat this "Battle of the Experts," Judge Rubin appointed medical experts for the court in 65 pending cases. *Id.* at 37.

Judge Rubin's use of court-appointed experts resulted in a drastic decline in the diagnosis of asbestosis. Although plaintiff's experts undoubtedly would have testified that every single one of the 65 plaintiffs had asbestosis, the court-appointed experts found that 10 had asbestosis (15%), 13 had pleural plaques (20%), and 42 were found to have no asbestos related condition (64.62%). *Id.* at 45. In the September 1987-September 1990 period, the court-appointed experts testified in 16 cases—in only two of the 16 did the jury find asbestosis (12.5%). *Id.* at 39-40. The jury verdicts essentially followed the expert testimony.

The findings of the medical experts that Judge Rubin appointed contrast sharply with the testimony of plaintiffs' medical experts and jury verdicts based upon that testimony. These findings may be usefully compared with the disease mix data which are substantially based upon plaintiffs' claims. See *infra* note 174.

<sup>121</sup> "It was well within the jury's province to decide to credit the testimony of plaintiff's doctors while discounting that of defendant's." *Dunn*, 774 F. Supp. at 937.

<sup>122</sup> See *infra* text accompanying note 128. In testifying, Judge Richard Neely stated: [A]s long ago as 1976 we were beginning to see a "competitive race to the bottom" in product [liability] cases. Typically, in a product liability case, there is an *in-state* plaintiff, an *in-state* judge, an *in-state* jury, *in-state* witnesses, *in-state* spectators, and an *out-of-state* defendant. When states are entirely free to craft the rules of liability anyway they want, it takes little imagination to guess that out-of-state defendants as a class won't do very well.

Testimony of Justice Richard Neely, *supra* note 52, at 1.

truth lies somewhere between the plaintiffs' and defendants' medical experts' testimony—Judge Rubin's experiment<sup>123</sup> indicates that it is closer to defendants'—a difference that amounts to hundreds of millions of dollars in higher verdicts.

Of all of the excluded evidence sought to be introduced by the parties in *Dunn*, perhaps the most dispositive would have been the testimony of a prior juror sitting when the case was first tried a year earlier.<sup>124</sup> That witness, a local resident, was prepared to testify that whereas the plaintiff was short of breath and in considerable discomfort while in the courtroom, when inadvertently observed outside the courtroom, he displayed no such symptoms.<sup>125</sup>

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<sup>123</sup> See *supra* note 120.

<sup>124</sup> The original jury was dismissed because the original judge became critically ill and a mistrial had to be granted. *Dunn*, 774 F. Supp. at 940 n.5.

<sup>125</sup> *Id.* at 940-41. The witness was excluded on procedural grounds. Cf. W.K. Morgan, *Clinical Significance of Pulmonary Function Test. Disability or Disinclination — Impairment or Importuning?*, 75 CHEST 6, 6 (1979) which states that "it has become apparent that the degree of breathlessness claimed by any particular subject is related to the reason why he or she is consulting the physician. Should the subject be claiming compensation, then he tends to exaggerate his symptoms." See also *Cain v. Armstrong World Indus.*, No. 87 Civ. 1172, slip op. at 7-8 (S.D. Ala. Feb. 18, 1992). In *Cain*, the court stated:

Each plaintiffs' testimony regarding pain and suffering was remarkably similar . . . . Without exception, the primary complaint of each plaintiff was that he could no longer do the kind of things around the house or yard (or engage in recreational activities) as he used to because of his shortness of breath. Some complained that their sex lives were affected. All but two of the plaintiffs are over the age of sixty, suggesting that the aging process itself would result in some curtailment of these activities. Several plaintiffs suffer from other illnesses which also contribute to the limitation on their activities. For example, [one] . . . is legally blind and suffers from diabetes. [Another] . . . is partially paralyzed and cannot speak as the result of a car accident. [Another] . . . suffers from chronic obstructive pulmonary disease, a smoking-related illness, heart problems and blackouts, all of which are unrelated to asbestos exposure. Most of the plaintiffs had normal pulmonary function, and none of the plaintiffs was determined by any medical testimony to have suffered any degree of permanent disability due to shortness of breath. . . .

. . . . Viewing the evidence in the light most favorable to the plaintiff, Brown [who was awarded \$580,000 in compensatory damages and \$3 million in punitive damages] was diagnosed with mild asbestosis, pulmonary function tests show[ing] no impairment in Brown's lung function. At age 59, George Brown at the time of trial was still working forty hours a week as a shipyard worker, an occupation which requires a good deal of physical stamina. By his own physician's testimony, his disease is unlikely to progress and his life expectancy has not been diminished by his disease. His major complaints are that "when I get home from work I'm worn out" and he cannot hunt and fish like he used to and cannot do things around the house like he used to. These complaints are hardly surprising considering his age and work schedule. Brown also testified that he worries about the possibility of contracting cancer.

*Id.* at 14-15.

Numerous rulings on the admissibility of evidence and trial conduct were made throughout the trial. Of the rulings regarded by the contending attorneys as significant, most were in favor of the plaintiff.<sup>126</sup>

A typical feature of plaintiffs' attorneys' asbestos case presentations is an appeal to local prejudice. Defendants are often out-of-state corporations while plaintiffs are often blue-collar workers.<sup>127</sup> Thus, in *Dunn*, plaintiff's counsel argued in summation: "You've got to have the courage to tell this big multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it."<sup>128</sup>

When one considers the significant possibility that the plaintiff was unimpaired<sup>129</sup> and yet received an after-remittitur award of

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<sup>126</sup> In addition to the exclusion of the testimony of a prior juror sitting on the same case, the defendant's attempt to put an economist on the stand during the punitive damage phase of the trial was also excluded on procedural grounds. *Dunn*, 774 F. Supp. at 941. Defendant also sought to exclude testimony of plaintiff's witnesses regarding lung cancer, mesothelioma, and heart trouble on the grounds that the plaintiff was not suffering from such conditions and was unlikely to develop them. *Id.* at 941. Defendant also objected to plaintiff's medical expert's testimony that a benign nodule discovered on plaintiff's lung was potentially malignant, on the ground that the testimony was prejudicial because it allowed the jury to speculate about plaintiff's potential development of various diseases which he was unlikely to contract and allowed plaintiff to go beyond issues framed in the pleadings. *Id.* Judge Motley overruled the objections and allowed the testimony on the grounds that plaintiff was not trying to recover for an enhanced risk of cancer but rather for emotional distress resulting from fear of developing cancer. *Id.* at 941-42.

Defendant objected to plaintiff's use of leading questions in examining its medical expert, as well as the experts' testimony on the state of medical knowledge during the first half of this century; these objections were overruled. *Id.* at 942-43. Plaintiff objected to parts of defendant's cross-examination of the expert; these objections were sustained. *Id.* at 943. Plaintiff objected to: defendant's cross-examination of plaintiff regarding plaintiff's adherence to safety procedures; defendant's attempt to demonstrate that plaintiff continued to work; defendant's attempt to introduce plaintiff's ownership of numerous houses in an effort to demonstrate that plaintiff was not financially burdened and no longer had significant contacts with the Virgin Islands. *Id.* These objections were not reversible error since plaintiff was not making a claim for lost wages or livelihood but only for pain and suffering. *Id.* at 943-44.

<sup>127</sup> See *supra* note 122.

<sup>128</sup> *Dunn*, 744 F. Supp. at 950. Defendant's motion for a mistrial on the basis of this statement was denied. *Id.* Defendants' claims that a number of the statements of plaintiff's counsel were prejudicial were denied on the grounds that the defendant failed to object at the time the statements were made thereby waiving its objections. *Id.* In addition to an appeal to local prejudice against out-of-state defendants in favor of local workers, plaintiffs' arguments typically seek to encourage juries to transfer wealth from "wealthy" corporations to comparatively impecunious workers. The arguments—often phrased subtly—encourage the jurors to take advantage of the opportunity to right the wrongs done *them* by society by rewarding the claimants at the expense of corporate America, a surrogate for American society. Wealth-shifting arguments find especially fertile ground in such locations as Brooklyn, N.Y., Philadelphia, Pa., and Beaumont, Tex. See *infra* notes 165-69 and accompanying text; see also *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990).

<sup>129</sup> See *supra* note 30 and *infra* text accompanying notes 138-44.



\$2,500,000, then *Dunn* may be viewed as a microcosm of the asbestos-litigation crisis.

Thus, the *O'Brien* and *Dunn* cases are illustrative of asbestos cases in which the existence of injury—or fear of injury—or even a benign but changed condition of a type associated with asbestos exposure coupled with testimony of some occupational exposure to asbestos-containing materials, is combined with liberal rulings on the admissibility of evidence (and on appeal, the appropriateness thereof) to create result-driven asbestos jurisprudence.<sup>130</sup>

Notable in this line of cases are the asbestos-in-buildings claims.<sup>131</sup> In suits by building owners against manufacturers of asbes-

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<sup>130</sup> There are numerous other examples of the application of "special asbestos law." Two recent appellate opinions, *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) and *Wundrack v. Armstrong World Indus.*, No. 91-5523 (3d Cir. Feb. 7, 1992) speak eloquently to the existence of different procedural and substantive rulings in asbestos cases. "Asbestos law" in operation in these cases operates to maximize awards to plaintiffs (both) including allowing gross exaggeration of lost future income (*Wundrack*); allocates litigation shares among defendants to maximize plaintiffs' recoveries rather than assess defendants' relative liabilities (both); approves excluding a settling defendant from a jury verdict sheet to increase a nonsettling defendant's share of the liability (*Wundrack*); renders unnecessary evidence of impairment (*Glasscock*), or direct or even circumstantial evidence regarding proximate cause or proof of loss (both), and even discussion of important and unsettled issues of state product liability law (*Wundrack*).

<sup>131</sup> Currently, the plaintiffs' bar is seeking to do in property damage cases what it has generally succeeded in doing in personal injury cases: imposing virtually unlimited liability on an expanded list of defendants. Damage claims amounting to scores of billions of dollars are being pursued on behalf of both public and private property owners who are seeking compensation for the cost of removing asbestos-containing insulation from various properties. Approximately 60 cases have gone to trial or been settled in the past ten years. The first asbestos property damage class action was filed ten years ago. *School Dist. of Lancaster v. Asarco*, Nos. 82-1414/1415 (Phil. Ct. Common Pleas 1982). Since then twelve more class actions have been filed, one on a nationwide basis and two on a statewide basis; none have gone to trial. See DEFENSE RESEARCH INST., CURRENT ISSUES IN ASBESTOS IN BUILDINGS E-1b (Jan. 23-24, 1992). See, e.g., *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part and vacated in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986) (voluntary class action certified and upheld); *Central Wesleyan College v. W.R. Grace & Co.*, No. 2:87-1860-2 (D.S.C. filed July 17, 1987) (certification argued and pending); *Clemson Univ. v. W.R. Grace & Co.*, No. 2:86-2055-2 (D.S.C. filed Aug. 1, 1986) (dismissed July 18, 1988 on finding that Clemson was alter ego of state and thus no diversity jurisdiction existed); *Sisters of St. Mary v. AAER Sprayed Insulation*, 445 N.W.2d 723 (Wis. Ct. App. 1989) (trial court's denial of class certification affirmed). For examples of other asbestos-in-buildings actions, see, for example, *Wesley Theological Seminary of the United Methodist Church v. United States Gypsum Co.*, No. 85-1606 (D.D.C. filed May 17, 1985), *rev'd in part*, 876 F.2d 119 (D.C. Cir. 1989) (tried May 1988, defense verdict; tort claims dismissed by lower court before trial and reinstated for new trial by appellate court); *Corporation of Mercer Univ. v. National Gypsum Co.*, No. C85-126-3-MAC (N.D. Ga. filed Apr. 9, 1985), *rev'd on other grounds*, 877 F.2d 35 (11th Cir.), *cert. denied*, 493 U.S. 965 (1989) (tried April 1986, \$2.4 million verdict for plaintiff—\$403,000 actual damages and \$2 million punitive damages; reversed on ground that there is no discovery rule for statute of limitations in Georgia); *Kansas City Airport v. W.R. Grace & Co.*, No. CV86-019615 (Jackson County Mo. Cir. Ct. filed Aug. 21, 1986) (tried March 1991, \$14.25 million verdict for plaintiff against Keene—\$8 million actual damages and \$6.25

tos-containing material for the costs of asbestos removal,<sup>132</sup> defendants have sought to introduce evidence of comparative risk. When trial judges allow defendants to introduce evidence of the almost infinitesimal risk of injury<sup>133</sup> to building occupants from exposure to asbestos as compared to risks of other injury,<sup>134</sup> juries return verdicts in favor of defendants more often than when the evidence is ruled inadmissible.<sup>135</sup> Substantial verdicts in favor of plaintiffs including puni-

million punitive damages; motion for judgment notwithstanding the verdict as to punitive damages granted by lower court and actual damages reduced by Manville payments to \$7,776,431.62; appeal pending); *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559 (D.S.C. 1986), *aff'd*, 827 F.2d 975 (4th Cir. 1987), *reh'g denied*, 840 F.2d 219 (4th Cir. 1988) (tried January 1986, \$8.4 million verdict for plaintiff—\$6.4 million actual damages and \$2 million punitive damages, reduced by lower court to approximately \$7 million); *Spartanburg County Sch. Dist. Seven v. National Gypsum Co.*, No. 6:83-1744-3 (D.S.C. filed July 23, 1983), *vacated and remanded in part*, 805 F.2d 1148 (4th Cir. 1986), *aff'd*, 842 F.2d 1292 (4th Cir. 1988) (tried August 1985, defense verdict, settled after first appeal with National Gypsum for \$141,000, retried April 27-28, 1987, verdict for plaintiff against U.S. Gypsum for \$106,107); *Lexington County Sch. Dist. Five v. United States Gypsum Co.*, No. 82-2072-0 (D.S.C. filed Aug. 17, 1982) (tried April 2-9, 1984 and settled April 9, 1984, shortly before going to the jury, for \$675,000, almost twice the actual damages claimed); *Athens City Bd. of Educ. v. National Gypsum Co.*, No. CIV-1-85-355 (E.D. Tenn. filed June 3, 1985) (tried January, 1987, \$563,000 actual damage verdict for plaintiff; settled on appeal); *City of Greenville, Tenn. v. National Gypsum Co.*, No. CIV-2-83-294 (E.D. Tenn. filed Sept. 16, 1983) (tried July 1988, defense verdict); *Anderson County Bd. of Educ. v. United States Gypsum Co.*, Civ. No. 3-83-511 (E.D. Tenn. filed August 22, 1983), *aff'd*, 821 F.2d 1230 (6th Cir. 1987) (tried March 1985, judgment for defendants). For a listing of these and all other known asbestos-in-buildings cases, see DEFENSE RESEARCH INST., CURRENT ISSUES IN ASBESTOS IN BUILDINGS A-13 to A-21 (Jan. 23-24, 1992).

<sup>132</sup> The basic thrust of the "buildings" cases is that the manufacturers of asbestos-containing materials, selected by architects for use in building construction, failed to warn that their products were sufficiently dangerous that they should not have been used.

<sup>133</sup> Asbestos in buildings poses far less of a health risk than most other environmental health hazards, such as tobacco smoke and radon. Richard Stone, *No Meeting of the Minds on Asbestos*, 254 SCIENCE 928, 930 (Nov. 15, 1991). Asbestos-in-buildings claims are not within the ambit of the proposed legislation set forth in the accompanying piece.

<sup>134</sup> Consider the relative risk to school children attending schools in buildings containing asbestos.

Cause	Deaths Per Million
Long-term smoking	1,200
Home Accidents (ages 1-14)	60
Motor-Vehicle Accidents (Pedestrian, ages 5-14)	32
Drowning (ages 5-14)	27
High School Football	10
Whooping Cough Vaccinations	1-6
ASBESTOS EXPOSURE IN SCHOOLS	0.005-0.093

B.T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 SCIENCE 294, 299 (Jan. 19, 1990). The relative risk data set forth in this footnote is precisely the kind of data that courts exclude.

<sup>135</sup> For examples of plaintiff's verdicts where comparative risk was excluded by way of

tive damage awards<sup>136</sup> occur despite considerable evidence that asbestos-containing products used in buildings generally pose no health hazard.<sup>137</sup>

### C. Pleural Plaques and the Asbestos Lottery

Substantial inhalation of asbestos commonly results—after a long latency period—in the formation of pleural plaques, which are detectable only by x-ray and do not cause any signs, symptoms or loss of pulmonary function.<sup>138</sup> Not infrequently the diagnosis of pleural

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motion *in limine*, see, e.g., *St. Joseph Hosp. v. The Celotex Corp.*, No. 186-047 (S.D. Ga. 1986) (\$500,000 verdict for plaintiff), *rev'd on other grounds*, 874 F.2d 764 (11th Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); *Corporation of Mercer Univ. v. National Gypsum Co.*, No. C85-126-3-MAC (M.D. Ga. filed Apr. 9, 1985), *rev'd on other grounds*, 877 F.2d 35 (11th Cir.), *cert. denied*, 493 U.S. 965 (1989) (tried April 1986, \$2.4 million verdict for plaintiff—\$403,000 actual damages and \$2 million punitive damages); *School Dist. of City of Independence, Mo. v. United States Gypsum Co.*, No. CV-80405334 (Mo. Cir. Ct. Mar. 13, 1984), *aff'd*, 750 S.W.2d 442 (Mo. Ct. App. 1988); *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559 (D.S.C. 1986), *aff'd*, 827 F.2d 975 (4th Cir. 1987), *reh'g denied*, 840 F.2d 219 (4th Cir. 1988) (tried January 1986, \$8.4 million verdict for plaintiffs—\$6.4 million actual damages and \$2 million punitive damages, reduced by lower court to approximately \$7 million). For examples of defense verdicts where motions *in limine* to exclude comparative risk were denied, see, e.g., *Cinnaminson Township Bd. of Educ. v. National Gypsum Co.*, 552 F. Supp. 855 (D.N.J. 1982), *aff'd*, 882 F.2d 510 (3d Cir. 1989); *Anderson County Bd. of Educ. v. National Gypsum Co.*, No. CIV-3-83-511 (E.D. Tenn. 1984), *aff'd*, 821 F.2d 1230 (6th Cir. 1987).

<sup>136</sup> See *supra* note 131.

<sup>137</sup> See *supra* note 133; see also Abelson, *The Asbestos Removal Fiasco*, 247 SCIENCE 1017 (Mar. 2, 1990) (editorial); Brooke Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 SCIENCE 294 (Jan. 19, 1990).

<sup>138</sup> The pleura is a two layer microscopically thin moistened membrane surrounding the lung consisting of the visceral pleura which surrounds the lung and the parietal pleura which lines the inside of the chest cavity. Between the two layers is a small, fluid filled space known as the pleural cavity. The role of the pleura essentially is to prevent friction between the lung and the chest cavity as the lungs expand and contract during breathing. It is not part of the lung itself and plays no role in the exchange of gases in the lung.

Pleural plaques are discrete, localized areas of pleural thickening, usually on the parietal pleura or on the diaphragm. Calcification of these plaques is a common but variable feature. They are considered a marker of asbestos exposure, although not necessarily of asbestos-related disease. Most are a few millimeters thick, cause no breathing impairment, and can be detected only on chest x-ray. The vast majority of individuals with plaques suffer no impairment and exhibit no signs, symptoms or loss of pulmonary function. In the rare case of an extremely large or diffuse pleural plaque, there may be a restrictive breathing impairment.

Exposure to sufficient quantities of respirable asbestos fibers can also cause diffuse pleural thickening of the visceral pleura due to the formation of scar tissue caused by asbestos fibers which have drifted to the pleura. There are many causes of pleural thickening, including tuberculosis, trauma to the lungs, pneumonia, and rib fractures. If caused by asbestos exposure, the thickening is bilateral—that is, occurring on both sides of the chest. In most affected individuals, diffuse pleural thickening is mild to moderate, can only be detected on chest x-ray, and causes no impairment of breathing functions and is not progressive. In a small number of individuals, diffuse pleural thickening becomes extensive enough to cause a restrictive breathing impairment and, in the extremely rare case, death. See RICHARD DOLL AND JULIAN PETO, *ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS* 2 (1985); ALFRED P.

plaque is erroneous.<sup>139</sup> Moreover, there is no evidence that these benign fibrous thickenings develop into malignant mesotheliomas or asbestosis or are functionally impairing.<sup>140</sup> Nonetheless, pleural plaque claims account for sixty to seventy percent of new asbestos claims filed and represent a substantial percentage of previously filed claims.<sup>141</sup> The existence of tens of thousands of such claims<sup>142</sup> is accounted for in part by mass screenings of industrial workers. These screenings are financed by plaintiffs' lawyers and usually done with

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FISHMAN, PULMONARY DISEASES AND DISORDERS, 840, 2038-39, 2135-36 (2d ed. 1988); H. CORWIN HINSHAW & JOHN F. MURRAY, DISEASES OF THE CHEST 726-27 (1980); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 244 (2d ed. 1982); American Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 AM. REV. RESPIRATORY DISEASE 363-64 (1986); Gunner Hillerdal, *Pleural Lesion and the ILO Classification: The Need for a Revision*, 19 AM. J. INDUS. MED. 125-30 (1991); Gunner Hillerdal, *Pleural Plaques in a Health Survey Material: Frequency, Development and Exposure to Asbestos*, 59 SCANDINAVIAN J. RESPIRATORY DISEASES 257-63 (1978); Ruth Lilis et al., *Pulmonary Function and Pleural Fibrosis: Qualitative Relationships with an Integrative Index of Pleural Abnormalities*, 10 AM. J. INDUS. MED. 145-47 (1991).

<sup>139</sup> Howard Frankin et al., *Radiologic Detection of Pleural Thickening*, 142 AM. REV. RESPIRATORY DISEASE 1325 (1990).

<sup>140</sup> The investigators who initially described the connection between exposure to asbestos and pleural plaques called such lesions "harmless scurrlous beauty marks on the chest film" because they found them neither associated with loss of function or symptoms nor precancerous. An extensive review of the literature 35 years later has revealed nothing to contradict these original impressions.

EDWARD A. GAENSLER, *Asbestos-Related Pleural Plaques: Much Ado About Very Little*, in DEFENSE RESEARCH INSTITUTE, THE 1991 ASBESTOS MEDICINE SEMINAR H-26 (Oct. 16-18, 1991) (citations omitted). See also ANDREW CHUNG & FRANCIS H.Y. GREEN, *PATHOLOGY OF OCCUPATIONAL LUNG DISEASE* (1988); P. Harber et al., *Pleural Plaques and Asbestos Associated Malignancy*, 29 J. OF OCCUPATIONAL MED. 641 (Aug. 1987); Robert N. Jones et al., *The Radiographic Pleural Abnormalities in Asbestos Exposure: Relationship to Physiologic Abnormalities*, 3 J. THORACIC IMAGING 57-66 (1988); Raimo Kivoluto et al., *Pleural Plaques & Neoplasia in Finland*, 330 ANNALS N.Y. ACAD. SCI. 31 (1979); Theresa C. McCloud et al., *Diffuse Pleural Thickening in an Asbestos-Exposed Population: Prevalence and Causes*, 144 AMER. J. ROENTGENOLOGY 8, 9-18 (Jan. 1985). Cf. Rubin & Ringenbach, *supra* note 120, at 37: "Pleural plaque does not interfere with the lung function, nor does it predispose a person to early death or a functional impairment. It is, however, an abnormal condition and, arguably, compensable." But cf. Irving J. Selikoff et al., *Predictive Significance of Parenchymal and/or Pleural Fibrosis for Subsequent Death of Asbestos-Associated Diseases* 9-12 (Oct. 1990) (unpublished manuscript filed and docketed in *In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Blinken), 129 B.R. 710, 741 (E. & S.D.N.Y. 1991)). Additionally, evidence as to whether pleural plaques lead to asbestos-related injury is accumulating as a consequence of the operation of pleural registries. See *infra* note 147. Observing how many persons enrolled in a pleural registry later file an action for asbestos-related injury yields relevant epidemiological data. While it is yet too soon to make formal observations, preliminary unpublished data indicate that less than five percent of those listed in the registry later file claims for injury. See Remarks of Andrew Berry, in *Administrative Alternative*, *supra* note 3, at 19. No attempt has been made to determine how these claimed injuries relate to the prior pleural plaque condition. More formal data gathering needs to be done, as the available data will become increasingly significant with the passage of time.

<sup>141</sup> See *infra* notes 170-74.

<sup>142</sup> See *supra* note 49, 58.

the active assistance of local union officials.<sup>143</sup> Often, mobile x-ray vans brought to plant sites are used for the screenings.<sup>144</sup>

Pleural plaque claims are handled differently in jurisdictions depending upon when the statute of limitations begins to run and whether the jurisdiction has established a formal or informal shunting aside device to deal with unimpaired claimants. Thus, there are: (i) "one disease" jurisdictions in which the statute of limitations begins to run for *all* asbestos-related injury claims from the time of the pleural plaque diagnosis; therefore, if the claimant manifests a malignancy caused by asbestos exposure ten years after exposure, he would be precluded by the statute of limitations from asserting such a claim;<sup>145</sup> (ii) "two disease" jurisdictions which consider any later developing asbestos-caused disease a separate disease, unrelated to the pleural plaque diagnosis in terms of the applicable statute of limitations;<sup>146</sup>

<sup>143</sup> Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at \*9 (D. Kan. May 30, 1990).

<sup>144</sup> See Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588 (D. Kan. May 30, 1990); Oliver & Spencer, *supra* note 3, at 76-77; Todd Woody, *The Rise and Fall of California's Asbestos King*, S.F. LEGAL RECORDER, Sept. 11, 1991, at 1. See also CLEVELAND PLAIN DEALER, Dec. 9, 1991, at 2C, a lawyer's advertisement stating "ATTENTION: Railroad Workers and Retirees — X-ray screening to determine the presence of asbestos related lung disease and hearing test to determine occupational hearing loss. Offered at no out of pocket cost to you." The "hearing loss" reference is to hearing loss claims under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1988). In recent years, tens of thousands of hearing loss claims have been brought. Case assembly methods are similar to some of those used in asbestos litigation. Lawyers solicit and sign up all of the workers in a plant to file such claims, and provide them with a medical examination. A complicating factor from the point of view of employers is presbycusis—hearing loss due to age. Since test results and losses from presbycusis are very similar to the loss from noise-induced hearing loss, it is often virtually impossible to separate out and quantify the hearing loss from presbycusis and the hearing loss from occupational noise exposure. Moreover, under the aggravation doctrine, the employer is liable for a worker's total hearing loss, even if part of it is caused by presbycusis. Moore v. Newport News Shipbuilding & Dry Dock Co., 15 Ben. Rev. Bd. Serv. (MB) 28 (1982); Primc v. Todd Shipyards Corp., 12 Ben. Rev. Bd. Serv. (MB) 190 (1980). The solicitation of hearing loss and asbestos claims in the same advertisement is instructive.

<sup>145</sup> See, e.g., Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1137 (5th Cir. 1985) (plaintiff must sue for all future injuries in one action within the statute of limitations).

<sup>146</sup> "[N]either the statute of limitations nor the single controversy rule should bar timely causes of action in toxic-tort cases instituted after discovery of a disease or injury related to tortious conduct, although there has been prior litigation between the parties of different claims based on the same tortious conduct." Ayers v. Township of Jackson, 525 A.2d 287, 300 (N.J. 1987). The plaintiff in this type of jurisdiction is permitted to bring an action for present damages without precluding a later cause of action if the latent disease develops. See, e.g., Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 520 (5th Cir. 1984) (under Mississippi law, "[l]ogic and justice require that presently latent injuries must await their separate maturity as a cause of action"); Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 520 (Fla. Dist. Ct. App. 1985) ("plaintiff may bring a second action for damages if and when he actually contracts cancer"); Smith v. Bethlehem Steel Corp., 492 A.2d 1286, 1296 (Md. 1985) (recovery for asbestosis does not preclude later cause of action if cancer develops); see also Peterson v. Instapak Corp., 690 F. Supp. 697, 702 (N.D. Ill. 1988); *In re Moorenovich*, 634 F. Supp. 634,

and, (iii) those jurisdictions which enroll the claimant diagnosed with pleural plaques in a "pleural registry," which suspends the running of the statute of limitations in the event of a later developing asbestos-caused disease.<sup>147</sup>

This choice of rule is generally made by the courts.<sup>148</sup> Enormous differences in the monetary valuations of pleural plaque claims between jurisdictions are a function of the choice of rule applied. In pleural registry jurisdictions, most of these claims have a value of, or near, zero; in jurisdictions permitting immediate suit but also allowing subsequent claims for later manifesting asbestos-related injury, the value of a pleural plaque claim is 0-\$15,000; in one disease jurisdictions, the value is substantially higher—by a factor of ten to fifty.<sup>149</sup>

A jurisdiction's position on recovery for "fear of cancer" or "enhanced risk of cancer" also impacts on the valuation.<sup>150</sup> Courts that allow a claim for damages (even though no ordinarily compensable physical injury has manifested itself) construct a cause of action distinct from the latent disease; it is the probability of the future occur-

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637 (D. Me. 1986); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. Ct. App. 1987); *Sheppard v. A.C. & S. Co.*, 498 A.2d 1126, 1134 (Del. Super. Ct. 1985).

<sup>147</sup> The term *pleural registry* is used to describe a formal court rule; where the suspension of the statute of limitations is accomplished by informal means, the term *green card* applies. A green card is effectively a waiver *in futuro* by the defendant of the defense of the statute of limitations in exchange for moving the case to the inactive docket. For an analysis of pleural registries, see Schuck, *supra* note 5. Pleural registries have been established in federal courts in the Northern District of California, the Northern District of Georgia, the Northern District of Illinois, the Northern and Southern Districts of Mississippi, the Western District of New York, the Northern District of Ohio, and the Districts of Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, and New Hampshire. State courts, often in the same locales, have followed suit (Cambridge, Massachusetts) or taken a similar lead (Cook County, Illinois). As of the end of 1990, there were 2,912 cases on the Massachusetts Pleural Registry (including both state and federal court cases) and 207 cases on the Connecticut Pleural Registry. Personal Letter (Jan. 10, 1991) (on file with the author). Districts with large asbestos caseloads but no deferral registries include the Eastern District of Pennsylvania and the Eastern and Southern Districts of New York. The Texas state courts also have not established registries and currently schedule cases for group trials according to filing date. See Schuck, *supra* note 5, at n.107.

Voluntary agreements to defer unimpaired asbestos claims have also been entered. See Schuck, *supra* note 5, at n.4 (listing such agreements entered in Illinois and Massachusetts).

<sup>148</sup> See *infra* text accompanying notes 154-63.

<sup>149</sup> See, e.g., *Giovanetti v. Johns-Manville Corp.*, 539 A.2d 871, 874 (Pa. Super. Ct. 1988); *Doe v. Johns-Manville Corp.*, 471 A.2d 1252, 1254 (Pa. Super. Ct. 1984); *Blue v. Johns-Manville Corp.*, 10 Phila. 23 (Phil. Ct. Com. Pleas Oct. 12, 1983), *aff'd*, 496 A.2d 848 (Pa. Super. Ct. 1985). See also *Asbestos*, MEALEY'S LITIG. REP., Jan. 10, 1992, at 15-16; *Asbestos*, MEALEY'S LITIG. REP., June 7, 1991, at 35; *Asbestos*, MEALEY'S LITIG. REP., Apr. 5, 1991, at 25-26.

<sup>150</sup> See Allan Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 RUTGERS L.J. 343 (1987); Barton C. Legum, Note, *Increased Risk of Cancer as an Actionable Injury*, 18 GA. L. REV. 563 (1984).

rence of such disease which gives rise to the present claim for damages.<sup>151</sup> Many courts require the plaintiff to show some physical injury or effect to recover for increased risk.<sup>152</sup> Precisely which types of physical injury or effect will be sufficient for an increased risk cause of action has not yet been conclusively resolved.<sup>153</sup>

Jurisdictions adopting the two-disease approach obviate the need for increased risk or fear of cancer recovery.<sup>154</sup> However, in a one-disease jurisdiction, where the statute of limitations begins to run upon discovery of the pleural change, rather than discovery of the latent disease, suit is brought for increased risk of cancer and/or fear of contracting cancer.<sup>155</sup> In presenting these claims, plaintiffs' law-

<sup>151</sup> See *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14 (D. Colo. 1984); *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984) (possible future development of spinal meningitis is a proper element of damage award). See also Brent Carson, Note, *Increased Risk of Disease from Hazardous Waste: A Proposal for Judicial Relief*, 60 WASH. L. REV. 635, 647-48 (1985) (recommending a new cause of action for increased risk as a plaintiff's alternative to waiting for a disease to develop to bring suit); Fournier J. Gale III & James L. Goyer III, *Recovery for Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723, 724 (1985) (describing damages for increased risk of cancer as "present recovery for the probability of future injury.").

<sup>152</sup> See, e.g., *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985). See also James M. Olson, *Shifting the Burden of Proof: How the Common Law Can Safeguard Nature and Promote an Earth Ethic*, 20 ENVTL. L. 891, 912 (1990).

<sup>153</sup> In Pennsylvania, this matter is particularly uncertain. Until recently, Pennsylvania permitted an award of damages for both increased risk of cancer, see *Giovanetti v. Johns-Manville Corp.*, 539 A.2d 871, 874 (Pa. Super. Ct. 1988); *Doe v. Johns-Manville Corp.*, 471 A.2d 1252, 1254 (Pa. Super. Ct. 1984), and emotional distress caused by fear of cancer, as long as plaintiff "is able to allege some physical injury or some medically-identifiable effect linked to [his or] her exposure to asbestos particles . . ." *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493, 508 (Pa. Super. Ct. 1984). However, in *Manzi v. H.K. Porter Co.*, 587 A.2d 778 (Pa. Super. Ct. 1991) (discussed *infra* notes 161-62 and accompanying text), the court allowed a jury instruction permitting the jury to find that pleural thickening is *not* a compensable injury, although a vigorous dissent claimed that under Pennsylvania law, "[t]he physical impact in the instant case, the existence of which enabled appellant to sue for emotional distress caused by his fear of cancer, was the pleural thickening and pleural plaques, medically-identifiable effects, which had been caused by his exposure to asbestos." *Id.* at 782 (McEwen, J., dissenting). Other jurisdictions have rejected "fear of cancer" claims by holding pleural plaques and thickening non-compensable. See, e.g., *Webb v. Pfizer Inc.*, No. C28-32211 (S.D. Ohio Apr. 21, 1991); *Jaquays Mining Corp.*, 752 P.2d at 30; see also *supra* note 30. *Contra* *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-84 (3d Cir. 1986) (pleural thickening held sufficient to support "fear of cancer" claim).

<sup>154</sup> *Ayers v. Township of Jackson*, 461 A.2d 184, 187 (N.J. Super. Ct. Div. 1983) (denying recovery for increased risk of disease for fear that such a recovery would lead to a flood of litigation), *aff'd in part and rev'd in part*, 525 A.2d 287 (N.J. 1987).

<sup>155</sup> The single cause of action rule can anomalously bar a claimant who has contracted cancer from recovery because the statute of limitations has expired. See, e.g., *Matthews v. Celotex Corp.*, 569 F. Supp. 1539, 1543 (D.N.D. 1983) (plaintiff who had been exposed to asbestos in 1962 and developed cancer was barred from filing suit in 1981, while permitting a patient who was free from cancer to recover based on future probability of cancer). *But see* *Gideon v. Johns-Manville Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985) (under Texas law, plain-

yers argue to the jury: If my client gets cancer next year, or in five or ten years, he cannot come back into court to seek damages. Our medical experts have testified that cancer is not unlikely, but all he can get for that injury is whatever you award him *today*. For this client, there is no tomorrow.

In one-disease jurisdictions, for every five such claims brought, one or two will result in defense verdicts, one or two will be a plaintiff's verdict in the amount of \$10,000-\$25,000, and the fifth will hit the asbestos lottery jackpot with a jury verdict of \$100,000-\$1,000,000.<sup>156</sup> No medical, occupational, or personal factors distinguish the claimants that are placed in the pleural registry, from those that go to trial and receive zero verdicts, from those who receive a \$1,000,000 verdict. Indeed, the facts making up the claims are often identical: the same claimed exposure, same age, same x-ray readings, same doctors testifying to the same sets of medical facts; all that differs is the verdict.

In Camden, New Jersey, a two-disease jurisdiction,<sup>157</sup> the verdict will be 0-\$15,000; nearby, in Philadelphia, Pennsylvania, a one-disease jurisdiction,<sup>158</sup> before a substantially similar jury, the same case could easily receive a \$250,000 verdict. As observed by Judge R.B. Klein of the Philadelphia Common Pleas Court more than eight years ago:

The asbestos litigation often resembles the casinos sixty miles east of Philadelphia more than a courtroom procedure. And just as the casinos are the winners in Atlantic City, the lawyers are the winners in asbestos litigation since the costs of litigation far exceed benefits paid to claimants.

...

... In two cases before this judge, two men had similar physical problems. They each had pleural thickening and some short-

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tiff presently suffering from asbestosis may recover damages based on the likely development of cancer).

<sup>156</sup> From the point of view of plaintiffs' lawyers operating on a contingent fee, the essential strategies and relevant considerations are dictated by the principles of portfolio management. Substantial effective hourly rates of return are obtained by amassing a sufficient caseload to "hit the average" thus accounting for the use of mobile x-ray vans and other mass collection techniques. See *supra* notes 49, 144.

<sup>157</sup> See *Township of Jackson*, 525 A.2d at 294.

<sup>158</sup> See *Giovanetti v. Johns-Manville Corp.*, 539 A.2d 871, 873 (Pa. Super. Ct. 1988) (in dicta, the court compared New Jersey law—which recognizes pleural thickening and cancer as separate and distinct injuries giving rise to separate causes of action which accrue only when the particular injury is discovered with Pennsylvania law, which does not create these distinct causes of action); *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493, 500 (Pa. Super. Ct. 1984) (statute of limitations begins to run when plaintiff knows or reasonably should know that he has been injured). But see *infra* notes 161-63.



ness of breath. In the case involving the man who most counsel believed to be the sicker of the two, the jury awarded \$15,000. For the other plaintiff, the jury awarded \$1,200,000. These results make this litigation more like roulette than jurisprudence.<sup>159</sup>

Often, judges in these lottery jurisdictions fully recognize these disparities though they are not as explicit as Judge Klein.<sup>160</sup> Indeed, they may seek to accentuate the disparities as a form of case management, since the lottery aspect often increases the pressure on defendants to settle.

In Pennsylvania, a single cause of action jurisdiction, in which awards to unimpaired claimants total in the tens of millions of dollars, two recent cases indicate the waning of the Pennsylvania asbestos lottery. In *Manzi v. H.K. Porter Co.*,<sup>161</sup> the Superior Court of Pennsylvania held that it was proper for the judge to have charged the jury that if it found that the plaintiff's pleural thickening was *not* a compensable injury, then the plaintiff was not prevented from returning in the event of a later manifesting injury, since the statute of limitations could not begin to run in the absence of injury.<sup>162</sup> While *Manzi* continues to provide the jury with the option to award plaintiff substantial damages for a pleural plaque diagnosis, its "enactment" ten years earlier, would likely have spared defendants millions of dollars in legal costs and jury verdicts. In *Czekaj v. Johns-Manville Corp.*,<sup>163</sup> a trial court panel went a giant step further and held that where plaintiff's medical expert had testified that his asbestos-related thickening was "asymptomatic," there was no cognizable cause of action as a matter of law. This holding, if sustained on appeal, severely depreciates the value of unimpaired claims in Pennsylvania.

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<sup>159</sup> *Blue v. Johns-Manville Corp.*, 10 Phila. 23, 36, 45 (Phil. Ct. Com. Pleas Oct. 12, 1983) (citations omitted), *aff'd*, 496 A.2d 848 (Pa. Super. Ct. 1985).

<sup>160</sup> *But cf. Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 320-21 (5th Cir.), *modified en banc*, 797 F.2d 256, (5th Cir. 1986) (while not abandoning the single cause of action rule, the Fifth Circuit recognized its inequity and recommended to the legislature that cancer be treated as a separate cause of action).

<sup>161</sup> 587 A.2d 778 (Pa. Super. Ct. 1991).

<sup>162</sup> While *Manzi* effectively gives juries the option of circumventing plaintiff's cause of action for fear of cancer which Pennsylvania purports to recognize, *id.* at 782 (McEwen, J., dissenting), several other jurisdictions had previously rejected the single cause of action rule. See *Ayers v. Township of Jackson*, 525 A.2d 287, 300 (N.J. 1987); see also *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 521 (Fla. Dist. Ct. App. 1985). In denying the plaintiff damages for injuries which may never occur, the court in *Cox* attempted to alleviate the drain on the finite sources of the asbestos industry, so that those who later actually develop cancer will be able to recover. See Remarks of Ronald L. Motley, in *Administrative Alternative*, *supra* note 3, at 16: "I support . . . within the judicial system, efforts to limit the filing of meritless cases so long as there is a guarantee that when those persons become more impaired—there is no such thing as unimpaired . . . they will have an opportunity to assert their claim."

<sup>163</sup> No. 478 (Phil. Ct. Com. Pleas Nov. 6, 1991).

The development and extent of pleural plaque cases are a substantial factor in the perverse incentive structure that permeates asbestos litigation and plays a very substantial role in the asbestos-litigation crisis,<sup>164</sup> both in terms of sheer volume and the various costs imposed on defendants including compensatory liability, punitive damages, and defense costs. In *Cimino v. Raymark Industries, Inc.*,<sup>165</sup> under the system devised by United States District Court Judge Robert Parker, pleural plaque claims in Texas were valued at \$540,000.<sup>166</sup> It has been estimated that if this valuation were assigned to each asbestos injury claim now pending, the total value of all claims would exceed sixty-two billion dollars<sup>167</sup>—a calculation which does not take into account higher valuations for mesothelioma and acute asbestosis or new claims being filed each month.

The lottery aspects which characterize the pleural plaque cases also apply to other asbestos litigation—most notably to disputed asbestosis claims.<sup>168</sup> As noted by District Court Judge Jack Weinstein:

The disparities [in asbestos litigation] are enormous. In New York City, for example, three large trials of similar plaintiffs and defendants were consolidated. One trial of twenty plaintiffs in the Southern District of New York resulted in twenty defense verdicts. A second of thirty-five plaintiffs in Supreme Court, New York County resulted in a verdict of \$65,000,000 plus punitive damages. A third of sixty-four plaintiffs in the Eastern District of New York resulted in thirteen defense verdicts and fifty-one plaintiffs verdicts for a total of \$35,000,000 with no punitive damages. Trials are much like a lottery with substantially higher verdicts in New York City, East Texas and parts of California than other parts of the country.<sup>169</sup>

<sup>164</sup> See *infra* notes 170-74.

<sup>165</sup> 751 F. Supp. 649 (E.D. Tex. 1990).

<sup>166</sup> It is noteworthy that the system adopted in *Cimino* designated set damage awards for each disease category, without regard for the individual variables (such as age, smoking history, severity, etc.) that would be taken into account under the tort system.

<sup>167</sup> Oliver & Spencer, *supra* note 3, at 79.

<sup>168</sup> See *supra* notes 107-25 and accompanying text.

<sup>169</sup> *In re Joint E. & S. Dist. Asbestos Litig.* (Findley v. Blinken), 129 B.R. 710, 749 (E. & S.D.N.Y. 1991). Referring to these state and federal Brooklyn Navy Yard trials, Judge Weinstein stated: "These cases tried . . . [in state court] are essentially the same in all respects with the cases tried in this [federal] court. The verdicts there [in state court], were at least four times the size of the verdict here." Transcript, *supra* note 32, at 5. See also Remarks of Andrew Berry, in *Administrative Alternative*, *supra* note 3:

[O]n the variability of the tort system [there] was an asbestos personal injury case that I tried on behalf of a defendant about a year-and-a-half ago; the trial stretched over five or six weeks, a jury of six was to decide, but a jury of twelve was empaneled because the case was going to go a long time and we might lose some people. Unlike many other cases, we didn't lose anybody, so we came to the end of the case, and this was the so-called "all issues case", we were trying whether the

D. *The Litigation Crisis and the Asbestos Disease Mix*

Increasing numbers of pleural plaque claims as well as claims of asbestosis brought by unimpaired persons result from the perverse incentive structure that pervades asbestos litigation. To be sure, occupational exposure to asbestos has resulted in extremely serious, debilitating, and fatal injuries, including mesothelioma, moderate and severe asbestosis, and (combined with cigarette smoking) lung cancer.<sup>170</sup> However, these serious disease claims constitute only about a quarter of the huge volume of asbestos litigation. Mesothelioma accounts for approximately three to four percent of current cases;<sup>171</sup> se-

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defendants ought to pay the plaintiffs and all the issues were in dispute—was the plaintiff sick, did the companies know or should they have known of the hazards of their products of which they failed to warn, were they wanton and reckless, were they liable for punitive damages. And these twelve people sat and listened relatively diligently and, if you try cases, you know that sometimes you have good jury chemistry, and these jurors seemed to like one another, they were seen in varying collections of groups on their way to lunch and back. And it came time for jury deliberations. The trial judge, who was a fair trial judge and gave everybody a fair trial, said, gee, I'd like to let all twelve deliberate. One of the counsels said, I don't think that's right; I would just as soon have six deliberate. So the six alternates were very disappointed. This had been a cohesive group, they had all heard the evidence, they all were charged on a regular basis by the judge to pay attention because they [might] be an alternate, conceivably, in case one of the regular jurors got sick. And they said we'd like to deliberate anyway. And the judge, who was a relatively new judge, said, well, okay. You can use my clerk's room, and you can go deliberate concurrently with the real jurors.

Now . . . [t]hese twelve people who had heard the identical evidence for six weeks went into two different rooms. The alternate jurors pretended they were real jurors. We had a knock on the door; they said we've reached a verdict; we've filled out the jury interrogatory form. Every one of the questions was answered in favor of the defendants. On the state of the art, no: the defendants didn't know and they reasonably shouldn't have known. And this was a well-tried case all around; . . . experienced lawyers on both sides. And the lawyers, including plaintiff's counsel, discussed this result with them because the real jury had not yet returned its verdict. And they said, oh, by the way, if you ever did get to the issue of damages, you're certainly not liable for any punitive damages and this is not a very serious case, we're thinking \$20,000-\$30,000 after a six week trial.

At about the time that the lawyers representing the defendant companies were congratulating themselves, we got a knock on the door from the real jury. I think the lawyers involved in the case, . . . probably thought that the value of the case—again, trading dollars for human misery—was about \$100,000, maybe \$125,000 in this jurisdiction, in this urban area. And, of course, the other six people who had heard exactly what the first six people had heard, came in with a plaintiff's verdict of \$1.3 million and punitive damages.

*Id.* at 17-18.

<sup>170</sup> See generally *In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken)*, 129 B.R. 710, 737-39 (E. & S.D.N.Y. 1991).

<sup>171</sup> I have been informed by Judge Weinstein that mesothelioma percentages for the current Manville Personal Injury Trust Claims are higher, closer to eight percent. That is likely accounted for by unique circumstances rather than different disease characteristics. Because the New York statute of limitations ran from the date of exposure, not discovery, the claims of

vere asbestosis, five to six percent; lung cancer, five to six percent; other cancers, two to three percent; and moderate asbestosis, ten to twelve percent. The litigation crisis is largely accounted for by other claims—those of the unimpaired and slightly impaired.<sup>172</sup> In this category, mild asbestosis claims, which are usually strongly contested by defendants on the issue of the medical diagnosis,<sup>173</sup> account for approximately fifteen to twenty-five percent of the total number of claims. Pleural plaque and other unimpaired pleural claims account for forty-five to sixty percent of outstanding claims. These claims, in which the victim can show no impairment, represent approximately sixty to seventy percent of new claims which are being filed at the rate of 1,000-2,000 per month.<sup>174</sup> Another two to four percent of claims are accounted for by other disease categories and are often disputed.

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most Brooklyn Naval Yard workers were barred. In 1986, New York amended its statute of limitations to allow these previously barred actions. N.Y. CIV. PRAC. L. & R. 214 (McKinney 1990). The resulting large influx of asbestos cases were more mature from point of view of manifestation of latent diseases—hence, the larger percentage of mesothelioma claims in the cohort group.

<sup>172</sup> See THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 51-52 (1987), estimating 25-75% of asbestos claimants are unimpaired. In a computation prepared for the Manville Trust reorganization, pending pleural plaques claims were estimated at 54.4%. *Findley*, 129 B.R. at 946.

<sup>173</sup> See *supra* text accompanying notes 112-23.

<sup>174</sup> See *supra* text accompanying note 48. Reliable data on the incidence of unimpaired claims in asbestos litigation may not be available. The problem is exacerbated by disagreement over the meaning of impairment. See *supra* note 30. Some studies indicate that 25-75% of all claimants are unimpaired. See WILLGING, *supra* note 172, at 51-52 (1987). When the Cook County, Illinois pleural registry was established, 462 of the 1,000 pending claims were placed on the deferral registry indicating at least 46% of the claims involved unimpaired pleural plaques. *In re Asbestos Cases* (Mulligan v. Keene Corp.), No. 1-91-1305, slip op. at 5-6 n.3 (Ill. App. Ct. Dec. 27, 1991) (citing defendant appellee's brief). While the Manville Trust Fund maintains the most extensive data on the disease mix of asbestos claimants—which while not coextensive with impairment data, is a close substitute—its figures lack reliability since so many of its disposed claims were settled with little or no confirmation of disease claims. *Findley*, 129 B.R. at 755-57. Most of the major asbestos defendants maintain records that include disease mix data. However, much of this data is simply extracted from plaintiffs' petitions. According to several defendants, the disease claims set forth in petitions are often inaccurate. Moreover, many petitions state that the claim is for "pleural disease" which could be asbestosis, pleural thickening, pleural plaque or none of these. Other petitions simply state "injury" and make no categorization whatsoever. Typically, defendants' compilations adjust the raw numbers to reflect and categorize imprecise disease designations in petitions and actual experience in medically reviewing disease claims in both litigated and settled cases. Thus, some defendants have refined the data extracted from petitions by transforming "pleural disease" and other nonspecific indications into specific data on the basis of disease mix data extracted from those petitions that have specifically characterized the claim. Other defendants have further refined the disease mix data extracted from petitions by passing the data through a matrix constructed on the basis of prior experience with petition data. Thus, on the basis of prior experience, 20% of asbestosis claims, for example, might be listed as pleural plaque claims, or 25% of pleural plaque claims may be listed as unexposed to asbestos (because on the basis of medical review, the x-ray data does not indicate any plaques). The data I have set

### E. Punitive Damages

The increasing propensity of juries to award, and courts to allow punitive damages is another factor in the perverse incentive structure which significantly contributes to the asbestos litigation crisis.<sup>175</sup> Punitive damages in asbestos litigation serve multiple purposes.<sup>176</sup> His-

forth in the text is based upon compilations by several asbestos defendants of information in petitions filed on behalf of plaintiffs.

According to calculations by RAND staff, which are based upon preliminary tabulations by Manville Trust Fund personnel from proof of claim forms provided by plaintiff's counsel, the disease mix for the Manville claimants for the period 1988 through August, 1991 is as follows:

	Percentage	Distributing the "unknown" claims on the percentage basis of the other claims
Mesothelioma	3	3.8
Lung Cancer	5	6.4
Other Cancer	1	1.3
Asbestosis	51	65.4
Pleural Plaques	18	23.8
None or Unknown	22	—

See Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1982, tbl. 1 (1992). Compare this data with an analysis of the 136,250 claims pending against the Manville Trust as of mid-April, 1991. This analysis adjusted the diseases claimed by claimants on the basis of the Trust's experience with disease claims versus actual proof by previous claimants of diseases. Also presented below, for purposes of comparison, is the disease mix data presented in the text.

	Adjusted Manville	Data in Text
Mesothelima	4.2%	3-4%
Lung Cancer	8.0%	5-6%
Other Cancer	2.6%	2-3%
Asbestosis	30.7%	30-43%
[ Severe Asbestosis		5-6%
Moderate Asbestosis		10-12%
Mild Asbestosis		15-25%
Pleural Plaque	54.4%	45-60%

See Findley, 129 B.R. at 934.

<sup>175</sup> See Statement of Judge Thomas M. Reavley before the Subcommittee on Intellectual Property and Judicial Administration 4 (Oct. 24, 1991) ("There are many places to put the blame for this disturbing situation, but the court system must assume its part of the responsibility. . . . We have allowed assessment of excessive verdicts and multiple punitive damage awards.").

<sup>176</sup> In asbestos litigation, punitive damage awards function as a docket control device. Ninety-nine percent of asbestos claims are settled, *see supra* note 8. Indeed, acceptable case disposition rates from the point of view of trial judges are dependent upon very high settlement rates. From the point of view of plaintiffs' lawyers, a high settlement rate is necessary to maintain a sufficient cash flow so that the costs of trials can be underwritten entirely by the proceeds of earlier settlements with other defendants in that same litigation. The coincidence of interests of trial judges and plaintiffs' attorneys in this regard and its effect on punitive damage awards is another significant element in the perverse incentive structure that perme-

torically, punitive damages have been imposed on defendants as punishment and as a deterrent to egregious conduct.<sup>177</sup> To be sure, all punitive damage awards punish, but it is doubtful that punitive damages constitute a deterrent in asbestos cases.

Few products containing asbestos are still being manufactured in the United States<sup>178</sup>—so there is no further defendant's conduct to deter.<sup>179</sup> Additionally, the imposition of multiple and redundant punitive awards in the asbestos litigation context both undermines the purposes of punitive damages and inefficiently allocates limited funds which could be used to compensate other defendants for their injuries.<sup>180</sup> While some courts bemoan the tremendous sums awarded,<sup>181</sup> no effective mechanism for controlling the size of these awards has been implemented to date.

Since the purpose of punitive damages is not to compensate claimants but rather to punish defendants, the deterrence component

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ates asbestos litigation. On occasion, when one of the traditional asbestos defendants disdains settlement values acceptable to plaintiffs' lawyers and seeks to impose settlement values that, for example, provide little or nothing for unimpaired claimants, the result is a lower settlement rate for that defendant. Thus, a defendant such as the Celotex Corporation, which broke away from the settlement herd and adopted a more aggressive posture, was seen to threaten the interests of both trial judges and plaintiffs' lawyers. Punitive damages are used in such a circumstance to prod the straying defendant to return to the settlement herd. Multiple punitive damages awards against Celotex drove it into bankruptcy. For an analysis of Celotex's settlement matrix, see *Asbestos*, MEALEY'S LITIG. REP. Feb. 1, 1991, at 1. The matrix put a Celotex share value of \$150 on claims involving pleural change; \$1,500 on cancer and asbestosis claims involving a smoker; \$2,000 on cancer and asbestosis claims involving a nonsmoker; \$3,500 on lung cancer claims involving a smoker and \$4,500 on lung cancer claims involving a nonsmoker; and \$5,000 on mesothelioma. At the time of the bankruptcy filing, Celotex had \$29.7 million in punitive damages verdicts outstanding. See *id.* Another traditional asbestos defendant which has opted to impose a settlement matrix is the Keene Corporation. See KEENE CORP., 1990 ANNUAL REPORT 4-5 (1991).

Punitive damages in asbestos litigation also function to accelerate payments to claimants in a jurisdiction. See *supra* note 52.

<sup>177</sup> See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (the purpose of punitive damages is not to compensate but to "punish reprehensible conduct and to deter its future occurrence") (O'Connor, J., concurring) (quoting *Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974)); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1076 (Ala. 1984), *vacated*, 475 U.S. 813 (1986), *modified*, 505 So. 2d 1050 (Ala. 1987).

<sup>178</sup> For a determination that the withdrawal of asbestos-containing materials (O-ring seals) from the market was a significant factor in the crash of the space shuttle, Challenger, see MICHAEL BENNETT, *THE ASBESTOS RACKET* 65-87 (1991).

<sup>179</sup> See *infra* text accompanying notes 182-89. See also *Magallanes v. Superior Ct.*, 213 Cal. Rptr. 547, 552 (Cal. Ct. App. 1985) ("[T]he objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages, and the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace.").

<sup>180</sup> See *supra* notes 32, 52 and *infra* notes 192-93, 217.

<sup>181</sup> See *infra* notes 192-93.

is an essential element. Take away deterrence and punitive damages become nothing but a windfall for the plaintiff.<sup>182</sup> Therefore, absent deterrence as a goal, punitive damages lose their constitutional moorings.<sup>183</sup>

But punitive damages awarded in asbestos cases do not and realistically cannot serve as a deterrent. First, current defendants in asbestos cases have not manufactured asbestos for the past fifteen to twenty years, hence, there is no longer any specific conduct to deter. Second, for there to be any general deterrence of egregious conduct, a manufacturer must be able to calculate the (avoidable) consequences of its conduct in order to conclude that the cost of the conduct would greatly exceed the return for engaging in the conduct. Consider, however, that in the asbestos context, this is not a particularly meaningful calculation because it seeks to deter a specific course of conduct by decreeing that a manufacturer already condemned to "death" via bankruptcy for engaging in a course of conduct resulting in enormous compensatory liability, would again be condemned to extinction if the act were particularly heinous.<sup>184</sup> "Dying" a second time is certainly inconvenient and while the prospect may accelerate the rate of the "first" death, that hardly constitutes deterrence.

The point was best made by Chief Judge Clark who held in *Jackson v. Johns-Manville Sales Corp.*,<sup>185</sup> that under Mississippi law, punitive damages were inappropriate in asbestos litigation. In the course of his opinion, Judge Clark made one of the most cogent arguments in the legal literature that the fundamental underpinning of punitive damages—its deterrence aspect—was totally lacking in asbestos litigation.

No manufacturer could engage consciously in wrongdoing that would expose it to such overwhelming strict liability with any reasonable expectation of doing so profitably. On the contrary, the prospect of exposure to massive litigation in strict liability provides the impetus for manufacturers to take affirmative steps to ensure the safety of their products, since mere non-negligent behavior is no guarantee against strict liability.

The significance of punitive damages as a deterrent depends upon the size of the penalty increase relative to the "base penalty"

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<sup>182</sup> See *Lenard v. Argento*, 699 F.2d 874, 890 (7th Cir.) ("[punitive] [d]amage[s] should not go beyond deterrence and become a windfall"), *cert. denied*, 464 U.S. 815 (1983).

<sup>183</sup> To be considered constitutionally permissible, punitive damages may not be "greater than reasonably necessary to punish and deter." *Pacific Mutual Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1046 (1991).

<sup>184</sup> See *infra* note 186.

<sup>185</sup> 727 F.2d 506 (5th Cir. 1984), *reh'g*, 750 F.2d 1314 (5th Cir. 1985) (en banc), *certifying questions to Miss. Sup. Ct.*, 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986).

exacted by strict liability compensatory awards. Because of the dimensionless character of the prospects for future litigation in this instance, the "base penalty," for all practical purposes, is illimitable. Correspondingly, the significance of punitive damages as a deterrent diminishes to the vanishing point.<sup>186</sup>

Punitive damages also do not serve a deterrent function because the current owners of the defendant corporations are often successor corporations of the original producers of asbestos. At the time they purchased the companies, they were unaware and could not have been aware of the liabilities involved.<sup>187</sup> One can only be deterred from doing a prohibited act if one knows or reasonably can know that by doing the act, certain negative consequences will ensue. Additionally, punitive damages are traditionally perceived as an exemplary remedy imposed for willful and wanton conduct—not mere negligence.<sup>188</sup> A

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<sup>186</sup> *Jackson*, 727 F.2d at 527. (citations omitted). The Fifth Circuit *en banc* vacated the lower court's ruling and certified the issue of punitive damages under Mississippi law to the Mississippi Supreme Court, which then declined certification, *Jackson v. Johns-Manville Sales Corp.*, 469 So. 2d 99 (Miss. 1985). The Fifth Circuit, by a nine to five vote, then held that punitive damages were appropriate in Mississippi asbestos cases. *Jackson*, 781 F.2d at 407. Despite its ostensible reliance on state law, it was apparent that the court had wide latitude to rule either way. The court's ruling in favor of punitive damages may be fairly characterized as an expression of the majority's personal proclivities. Consider Chief Judge Clark's dissent dealing with the policy implications of imposing punitive damages:

[T]he court fails to take into account that what we say here creates new precedent. We are not passing a milepost along a known path leading to a chosen goal. Instead, the court, without a goal, chooses a new path which will compel the way of all litigants who come later. Given this situation, the proper judicial response should be one based on a broad view of the whole question.

*Id.* at 416 (Clark, J., dissenting).

<sup>187</sup> Judge Bazelon expressly so determined in *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 951 (1982). See *supra* note 51 for a discussion of *Keene*; see also *supra* text accompanying notes 81-85 and *infra* text accompanying notes 270-72.

<sup>188</sup> See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280 (1935); see also *Acosta v. Honda Motor Co.*, 717 F.2d 828, 834 n.7 (3d Cir. 1983) ("[p]unitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like which constitute ordinary negligence.").

In *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990) the court sustained verdicts for two plaintiffs totalling \$1,350,000 in compensatory damages and \$5,800,000 in punitive damages. The majority issued an opinion in which it said, "[t]he jury was free to conclude from this and other evidence presented that appellants knew [or should have known] of the dangers of asbestos and did not adequately protect or warn users of asbestos, thereby acting in a wanton or reckless manner." *Id.* at 1288. When the appellants filed a Petition for Rehearing, noting that the court erred in applying a negligence rather than a recklessness standard, the court issued a revised opinion, word-for-word identical, except deleting the bracketed words "or should have known." Compare *id.* with the originally issued slip opinion, *Johnson v. Celotex Corp.*, No. 89-7484, slip op. at 18 (2d Cir. Mar. 20, 1990) (on file with author). Judge Maloney concurred in sustaining the compensatory award but dissented as to the punitives, focusing on the fact that while there was evidence that the defendant knew of the dangers of asbestos to workers in its manufacturing plants, there was no evidence



successor's purchase of a former asbestos producer may not constitute sufficiently wanton conduct to impose punitive damages on the successor for the actions of its predecessor.<sup>189</sup>

While the use of punitive damage awards to punish civil defendants for past actions has withstood constitutional challenge,<sup>190</sup> its constitutionality may be undermined by the prevalence of its use in asbestos cases.<sup>191</sup> In the asbestos-litigation setting, the same defend-

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that Owens-Illinois or anyone else knew of the dangers to workers not in asbestos manufacturing plants who worked alongside workers who were installing the manufactured materials. Judge Maloney stated:

Punitive damages, however, are not properly chargeable against a defendant who merely "should have known" of the risk in question. It must be shown that the defendant was aware of the risk, and that he consciously disregarded it. . . . This record contains *no* evidence that either medical researchers or asbestos manufacturers possessed, in the mid 1940s, information establishing, or even predicting, that "bystanders" might experience unsafe levels of exposure in shipyards where finished hardbound insulation products containing asbestos were in use. . . . The majority paints with much too broad a brush, as I see it, in its reference to "the dangers of asbestos."

This is hardly the "recklessness . . . close to criminality" which we [have] described . . . as the standard for awarding punitive damages under New York law. As Judge Friendly there said, "error in failing to make what hindsight demonstrates to have been the proper response—even 'gross' error—is not enough to warrant submission of punitive damages to the jury."

*Id.* at 1291-92 (citations omitted) (discussing *Roginsky v. Richardson-Merrell*, 378 F.2d 832 (2d. Cir. 1967) as the standard for punitive damages).

<sup>189</sup> See *Myers v. Keene Corp.*, No. 82-3922 (E.D. Pa. Aug. 21, 1985), wherein the court reasoned that a successor may only be liable for punitive damages if the successor has a sufficient degree of identity or continuity with its predecessors' officers, directors, and personnel. In *Myers*, the court did not require the successor to pay punitive damages based on its predecessor's recklessness. See also *Brotherton v. Celotex Corp.*, 493 A.2d 1337, 1340-43 (N.J. Super. Ct. Law Div. 1985) (applying the "continuation theory" to impose punitive damages on a successor corporation); *but cf.* *Duca v. Raymark Indus.*, No. 84-0587 (E.D. Pa. Nov. 6, 1986) (holding the mere acquisition of a company was enough to transfer liability for punitive damages even absent continuity of ownership or management).

<sup>190</sup> In *Browning-Ferris Indus. of Vermont Inc. v. Kelco Disposal Inc.*, 492 U.S. 257 (1989), the Supreme Court held that punitive damage awards in civil cases did not implicate the Excessive Fines Clause of the Eighth Amendment. U.S. CONST., amend. VIII. Most recently, the Court held in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), that the assessment of punitive damages is not so fundamentally unfair as to constitute a per se violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 1041. However, the Court effectively held that the Due Process Clause places limits on punitive damage awards by noting its concern regarding the potential for "extreme results that jar one's constitutional sensibilities" in the fixing of punitive damage awards. *Id.* at 1043.

<sup>191</sup> See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *In re Northern Dist. Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459

ants are being redundantly "punished" with punitive damages from jurisdiction to jurisdiction.<sup>192</sup> The result of these multiple punishments is to deplete the funds available from which to compensate other plaintiffs for their injuries.<sup>193</sup>

Rulings allowing punitive damages are often accompanied by assertions that punitive damages are highly inappropriate and confessions of the courts' impotence to slow the runaway punitive damage train.<sup>194</sup> The timidity of courts' rulings on punitive damages markedly contrasts with such actions as using sampling techniques as a substitute for jury verdicts,<sup>195</sup> mass consolidations,<sup>196</sup> and class actions.<sup>197</sup> The total of punitive damage verdicts in asbestos cases to

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U.S. 1171 (1983). See also Dennis Jones et al., *Multiple Punitive Damage Awards For a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1 (1991).

<sup>192</sup> Judges have expressed concern over repetitive punitive damages in the mass tort context for some time: "We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); see also *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns . . ."); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (Weinstein, J.) ("[W]hen a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."). *But cf. McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

Despite concerns over multiple punitive damage awards, the courts have been reluctant to remedy the deficiencies under the current scheme. In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), Judge Sarokin convincingly made the case that punitive damages in asbestos cases were inappropriate, basing the conclusion *inter alia* on the view that multiple awards of punitive damages for a single course of wrongful conduct violates the defendants' rights under the Due Process Clause of the Fourteenth Amendment. *Juzwin*, 705 F. Supp. at 1060-64. However, Judge Sarokin then reconsidered his order in the case striking punitive damages against any defendant who presented competent proof that it had already paid punitive damages for the same course of conduct currently alleged by plaintiffs. *Juzwin*, 718 F. Supp. at 1236. The court then allowed punitive damage claims to proceed even though "there has been or may be a violation of defendants' due process rights through repetitive awards of punitive damages. . . ." *Id.*

<sup>193</sup> Schwarzer, *supra* note 44, at 116 ("In mass tort cases such as those involving asbestos, the available assets of the defendants may be depleted long before all plaintiffs are compensated. To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair."). See also *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985) (Clark, C.J., joined by Garza, J., Gee, J., Politz, J. and Jolly, J.J., dissenting), *aff'd on reh'g*, 781 F.2d 394 (5th Cir.) (en banc), *cert. denied*, 478 U.S. 1022 (1986); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478 (N.J. 1986).

<sup>194</sup> See *supra* notes 175, 191-92.

<sup>195</sup> *Cimino v. Raymark Indus.*, 751 F. Supp. 649 (E.D. Tex. 1990).

<sup>196</sup> See *infra* notes 230-65 and accompanying text.

<sup>197</sup> *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 521 (Fla. Dist. Ct. App. 1985).

date is in the hundreds of millions of dollars<sup>198</sup> despite the fact that punitive damages serve no valid deterrence purpose,<sup>199</sup> and that multiple and illimitable awards of punitive damages for the same wrongful acts—selling asbestos containing materials without adequate warnings—should be held to violate constitutional standards.<sup>200</sup> In fact, the availability of punitive damages may well have driven up defense costs by millions of dollars.<sup>201</sup> While, absent punitive damages, plaintiffs' attorneys would likely settle certain cases, they are far more likely to litigate these cases when the potential for punitive damages exists.<sup>202</sup>

#### F. *Alternatives to an Administrative Alternative: Judicial Innovations*

In reaction to Congressional inaction in this area, some judges have sought to implement alternatives to individual adjudication to alleviate their tremendous caseloads.<sup>203</sup> A common feature of these

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<sup>198</sup> No reliable estimate exists of the amount of punitive damages awarded in asbestos cases. Many of the awards are in unreported cases. A survey of punitive damage verdicts in the years 1987-1990 yields the following figures:

1987	\$ 75,000,000
1988	\$ 10,134,000
1989	\$178,130,266
1990	\$ 52,503,000 (partial figure)

This data was cumulated by adding the value of all punitive damage awards made to claimants which were reported in *Asbestos*, MEALEY'S LITIG. REP., 1987-90. While this four-year compilation totals more than \$315 million, many punitive damages verdicts are remitted to judgment. Probably somewhere in the range of \$100-150 million in judgments have been levied against defendants—though this does not mean that this amount has actually been paid out. Several large punitive awards have resulted in bankruptcies; many other punitive damage awards are currently on appeal. Finally, large compensatory and punitive damage awards are used as a basis for settling other cases at or near the top of the trial docket.

<sup>199</sup> See *supra* text accompanying notes 177-88.

<sup>200</sup> See *supra* text accompanying notes 191-93.

<sup>201</sup> Defendants do not concede that punitive damages augment settlement costs. In part, this reflects issues of insurance coverage—most policies do not cover punitive damages—and in part, an unwillingness as a matter of settlement strategy to ascribe any value to the availability of punitive damages. Despite defendants' denials, the availability of punitive damages does add both to transaction costs and settlement values.

<sup>202</sup> In rejecting settlement offers, plaintiffs' lawyers sometimes state that because of the possibility of punitive damages, they would prefer to "roll the dice." See *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990) ("Perhaps some portion of the sums paid in settlements reflect an anticipation of the likelihood and extent of punitive damages that might have been awarded . . .").

<sup>203</sup> Consider the following passage excerpted from a letter by United States District Court Judge Robert M. Parker in discussing how to better administer asbestos litigation:

We now have an opportunity to prove that the federal courts are not impotent. It is incumbent upon us to establish that we are viable as an institution and

efforts is the consolidation of a large number of claims (hundreds and even thousands) into a single proceeding and the conversion of part of the proceeding into an essentially administrative format. From a policy perspective, the use of what is essentially an administrative remedy being effectuated by a federal judge raises significant questions.<sup>204</sup> The creation of a national health insurance program for workers occupationally exposed to asbestos-containing materials is within the purview of the legislative branch of government; nonetheless, a functionally equivalent national policy is effectively being created and administered by the judiciary with regard to compensation for toxic torts.<sup>205</sup> The method of resolution is essentially an administrative proceeding presided over by a judge who is creating and implementing those policies.<sup>206</sup> These essentially legislative enactments by courts are being driven, according to the courts, by legislative inaction.<sup>207</sup>

Two of the most important judicial innovations in asbestos litigation to date are the Rule 23(b)(1)(B)<sup>208</sup> class action and the mass

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that we can provide modern solutions for modern problems. If we fail to rise to the task, I fear far reaching consequences.

I deeply believe we are not irrelevant—that we do have a role in our society that is greater than refereeing one-on-one litigation in an expensive and cumbersome manner, or presiding over drug cases, Social Security appeals, and prisoner petitions.

Letter from Judge Robert M. Parker, Eastern District of Texas, to Judge Charles R. Weiner, Eastern District of Pennsylvania (Aug. 1, 1991) (on file with the author).

<sup>204</sup> Prominent members of the bench, bar, legal academy, and business community, along with some high profile government commissions, have charged that increased access to the courts and pro-plaintiff tort doctrines have failed to solve the problems they were designed to address and have instead resulted in a civil justice system that is sinking under the weight of mass toxic tort and other product liability cases.

Weinstein & Hershenov, *supra* note 5, at 275.

<sup>205</sup> See *supra* notes 50, 203.

<sup>206</sup> See Remarks of Andrew Berry, in *Administrative Alternative*, *supra* note 3:

[H]ow [was] the re-structured Manville or the aborted Eagle-Picher class action restructuring going to be any different from an administrative system except that the board of directors was probably going to have my colleague, Mr. Motley, and some others, and maybe somebody like me, as well as judges and business people on it, as opposed to a board which would be set up in one of the Federal administrative agencies. If you actually look at the elements of [an] administrative system, the aggregative treatment that the tort system now imposes in some areas looks very, very much like an administrative system—you get a big bunch of money together, you set up a schedule of benefits, you figure out how you are going to pay them out, and you do it, except you just do it in Brooklyn or maybe you just do it in Beaumont, Texas. That is not a good way to run a railroad if you have a national problem.

*Id.* at 60.

<sup>207</sup> See *supra* text accompanying notes 37-46.

<sup>208</sup> FED. R. CIV. P. 23(b)(1)(B) class actions are particularly appropriate in these cases as

consolidation.

### 1. Rule 23(b)(1)(B) Class Actions

Rule 23(b)(1)(B) class actions are used when plaintiffs' claims threaten to exceed defendants assets, thereby creating the likelihood that later claimants will be unable to receive compensation for their injuries.<sup>209</sup> They have the added utility of being mandatory class actions that do not permit class members to opt out and bring their own separate law suits.<sup>210</sup>

The benefits generally attributed to class actions as a procedural technique to replace individual claim adjudication are:

(i) conserving judicial resources by allowing many claims to be heard simultaneously, thereby reducing judicial back-log and preventing the judicial paralysis that could be caused by an individual adjudication of thousands of repetitive claims;<sup>211</sup>

(ii) permitting a more expeditious compensation scheme for many plaintiffs;<sup>212</sup>

(iii) diminishing transaction costs—by lessening total court costs, defraying the costs of individual representation and enjoying the economies of shared discovery and expert witness costs;<sup>213</sup>

(iv) facilitating communication, management, and settlement of claims through the consolidation of representation by one or a small group of attorneys;<sup>214</sup>

(v) facilitating the creation of a unified substantive law for asbestos litigation, rather than an ad hoc body of jurisprudence, based on inconsistent jury verdicts which provide unreliable statements of the

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they expressly provide for such classification of numerous claims made against "a fund insufficient to satisfy all claims." *Id.*

<sup>209</sup> For an example of its application, see *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

<sup>210</sup> *See id.*

<sup>211</sup> JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.1, at 722 (1985).

<sup>212</sup> *See, e.g., In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 894 (N.D. Cal. 1981) (the federal courts have an "inherent power which is broader and more flexible than the authority granted in the Federal Rules [and] is derived from the court's duty to achieve expeditious disposition of cases."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom., A.H. Robins Co. v. Abed*, 459 U.S. 1171 (1983).

<sup>213</sup> *See* Roger Bernstein, *Judicial Economy and Class Action*, 7 J. LEGAL STUD. 349 (1978); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 671 (1989).

<sup>214</sup> David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 705 (1989).

law;<sup>215</sup>

(vi) affording an opportunity for the common claims and defenses of an entire class to be adjudicated with finality in one proceeding;<sup>216</sup>

(vii) obviating many of the abuses inherent in multiple punitive damages awards;<sup>217</sup> and

(viii) providing the judiciary with greater opportunities for supervision and intervention, including court control over attorney fees and litigation expenses, as well as judicial approval of all settlements and dismissals.<sup>218</sup>

The most notable obstacle to the use of Rule 23(b)(1)(B) class actions in asbestos litigation is the Anti-Injunction Act<sup>219</sup> which prohibits federal courts from staying pending state court proceedings.<sup>220</sup> The utility of a 23(b)(1)(B) consolidation is undermined if plaintiffs can simply avoid the federal court and bring their actions in state court. Resources expended on defending state actions and damages awarded in those actions would remove those funds from the pool of resources available for federal claimants. Additionally, any improvements in efficiency would be compromised by concurrent state court actions.

A second difficulty with using 23(b)(1)(B) class actions in asbestos litigation is the problem of unascertained plaintiffs. Since the manifestation of most asbestos-related injuries often takes years, not all potential plaintiff class members will be able to come forward to participate in the litigation. Once the class has closed, those who manifested injuries later would be foreclosed from bringing suit against the class action defendant.

Different jurists have proposed varied solutions to these problems. Judge Jack Weinstein has addressed both of these issues while presiding over the Joint Eastern and Southern District of New York Asbestos Litigation dealing with asbestos defendants Johns-

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<sup>215</sup> See Geoffrey Hazard, *The Effect of the Class Action Device upon Substantive Law*, 58 F.R.D. 307, 312 (1973).

<sup>216</sup> See FRIEDENTHAL, *supra* note 211, § 16.8, at 756.

<sup>217</sup> Briggs L. Tobin, Comment, *The "Limited Generosity" Class Actions and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 462-65, 474-79 (1989).

<sup>218</sup> See Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"*, 92 HARV. L. REV. 664, 667-68, 680-81 (1979) (discussing need for continual court intervention in class action suits).

<sup>219</sup> 28 U.S.C. § 2283 (1988).

<sup>220</sup> The Anti-Injunction Act only prohibits federal courts from enjoining pending state proceedings, not from preventing future state court actions. See *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965).

Manville and Eagle-Picher.<sup>221</sup> Under the Anti-Injunction Act, federal courts are permitted to stay state proceedings: (1) when expressly authorized by Congressional statute,<sup>222</sup> or (2) "where necessary in aid of [the court's] jurisdiction,"<sup>223</sup> or (3) "to protect or effectuate its judgments."<sup>224</sup> Judge Weinstein has held that the certification of a national mandatory class falls within the provisions of the Anti-Injunction Act since (1) an injunction of state proceedings was necessary to effectuate a settlement, (2) to protect federal jurisdiction over a pending class action, and (3) to prevent dissipation of the asbestos manufacturer's assets in an inequitable manner.<sup>225</sup> In further support of that holding, Judge Weinstein cited the All Writs Act<sup>226</sup> as an affirmative grant of such power to the courts, as well as a Congressionally created exception to the Anti-Injunction Act.<sup>227</sup> To solve the problem of potential plaintiffs, he framed the class to include future claimants as well.<sup>228</sup> Ultimately, however, the Rule 23(b)(1)(B) Eagle-Picher proceeding did not prevail.<sup>229</sup>

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<sup>221</sup> See *In re Joint E. & S. Dists. Asbestos Litig.* (Findley v. Blinken) 120 B.R. 648 (E. & S.D.N.Y. 1990); *In re Joint E. & S. Dists. Asbestos Litig.* (White v. Eagle-Picher Indus., Inc.) 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

<sup>222</sup> 28 U.S.C. § 2283 (1988).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Eagle-Picher*, 134 F.R.D. at 37; *Findley*, 120 B.R. at 656. The Eighth Circuit in vacating a Rule 23(b)(1)(B) mandatory class certification award, held that the Anti-Injunction Act barred the district court from enjoining state court proceedings. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). A Rule 23(b)(1)(B) class certification was also rejected in *In re School Asbestos Litig.*, 789 F.2d 996, 1005-07 (3d Cir.), *cert. denied*, 479 U.S. 852, and *cert. denied*, 479 U.S. 915 (1986).

<sup>226</sup> 28 U.S.C. § 1651(a) (1988). This section provides "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.*

<sup>227</sup> *Eagle-Picher*, 134 F.R.D. at 37-38; *Findley*, 120 B.R. at 656.

<sup>228</sup> *Eagle-Picher*, 134 F.R.D. at 34. The class certified in the Eagle-Picher class action was defined as consisting of "all persons who currently, or may at any time in the future, assert or claim to have asbestos-related personal injury or wrongful death claims against Eagle-Picher based upon exposure to its asbestos-containing products." *Id.* Several constitutional concerns are implicated by the inclusion of future claimants within the named class in asbestos litigation (and other toxic tort litigation as well). Since future claimants' claims have not yet ripened and hence, future claimants have not received actual notice, significant due process issues are involved. Appellate review and perhaps legislation will be required to solve this issue.

<sup>229</sup> The uncertainties inherent in the invocation of Rule 23(b)(1)(B) led Eagle-Picher to decline to proceed—fearing that while exposing its entire assets to the class claimants, it would still be subject to tens of thousands of state court claims. Judge Weinstein then attempted to fashion a settlement that would effectively bypass these difficulties but his attempts to convince the leading plaintiffs' lawyers to participate were unsuccessful. Eagle-Picher then filed a Chapter 11 bankruptcy proceeding. See Dana Milbank & Wade Lambert, *Eagle-Picher Seeks Shield of Chapter 11*, WALL ST. J., Jan. 8, 1991, at A3.

## 2. Mass Consolidations

Another judicial innovation is the mass consolidation which is being increasingly resorted to by trial judges to resolve the asbestos-litigation crisis.<sup>230</sup> Some mass consolidations, however, may have counterproductive effects and contribute to the creation of a perverse incentive structure. From the moment a court announces that it is considering consolidating its asbestos cases into a mass litigation, some jurisdictions have experienced a significant increase in the rate of new asbestos-claims filings.<sup>231</sup>

<sup>230</sup> As one jurist has stated: "More justice for more people should be our goal—not less justice for ever fewer people. Nevertheless, we cannot agree with those who would have the courts attempt to treat mass tort cases on a one-by-one basis, as though they were two car accidents." Weinstein & Hershenov, *supra* note 5, at 276. *But cf.* Remarks of Ronald Motley, in *Administrative Alternative*, *supra* note 3, at 16: "We need a two-year cooling-off period. We need some sort of cessation of the filing of motions for [mass] consolidation."

<sup>231</sup> While there is no indication that the federal and state consolidations of the Brooklyn Naval Yard cases increased filings, dramatic increases have been recorded in the now ongoing Baltimore, Maryland consolidation of over 9,000 cases, the largest ever attempted in American civil litigation. See ANDREWS ASBESTOS LITIG. REPORTER, Dec. 20, 1991, at 24343.

Sources say that Judge Levin is sticking to his plan to proceed with a phased trial of the 9,000 cases on February 17, 1992. In the first phase, a jury will address all issues presented by a small number of representative cases plus issues common to all 9,000 cases. Another phase of the trial will address the plaintiffs' punitive damage claims. If the jury finds the defendants liable for punitive damages, it would then proceed to consider evidence concerning the liable defendants' net worth and to assess a punitive damage multiplier for each liable defendant.

*Id.*

It is important to examine the dynamic involved in the increased filings. Some defendants' lawyers are currently estimating that more than 85% of the 9000 plus cases are being brought by unimpaired persons and that these cases account for a disproportionate share of the new filings. My speculation—and it is only speculation pending further study—is that many people who can claim some occupational exposure to asbestos-containing products but have no impairment and therefore do not feel it worthwhile to file a claim and wait the requisite number of years for their case to advance to trial, nonetheless come forward to file claims when they can gain immediate inclusion in a mass consolidation. In such a consolidation, the individual facts of their claims may well be merged (that is, submerged) into the mass facts. By simply being in the line, they may be able to obtain compensation through a mass settlement or be instant lottery winners by being included in a sampling group. See *infra* note 255. Moreover, if they end up going to trial it will likely be as part of a group of 10-50 claimants, some of whom will have serious impairments that merit substantial compensation. The unimpaired claimants may anticipate that at least some of them will benefit from the jury's sympathy generated by the seriously impaired claimants. See *supra* note 19 and *infra* note 241. This may indeed occur at the expense of the seriously injured. Consider Judge Weinstein's observations regarding the verdicts in the Brooklyn Naval Yard consolidation:

The verdict in this Court indicates that the juries do not, at this moment, necessarily agree with that distinction between pleural cases and the more serious cases because they have granted very high verdicts for the pleural injuries where the amount of incapacity is minimal, if anything, and relatively small verdicts in the mesothelioma cases where the amount of incapacity and harm is very great.

Transcript, *supra* note 32, at 8.

Finally, there is also the possibility that a small percentage of the unimpaired—perhaps 10-



Because of the huge volume of cases, "[c]onsolidations have become increasingly necessary in . . . asbestos cases. . . ." <sup>232</sup> However, "considerations of convenience must yield when consolidations threaten to deny litigants a fair trial." <sup>233</sup> The issue of whether to consolidate claims for trial involves a weighing of

the specific risks of prejudice and possible confusion . . . [versus] the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one and relative expense to all concerned of the single-trial, multiple-trial alternatives. <sup>234</sup>

Factors which support consolidation of asbestos cases include the existence of a common worksite, similar occupation, similar time of exposure, and similar type of disease. <sup>235</sup> These criteria were present in varying measure in the Brooklyn Naval Yard Cases. <sup>236</sup> When

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20%—will hit the asbestos lottery and be awarded \$100,000 or more. See *supra* text accompanying notes 156-59; see also Norwood S. Wilner, *Asbestos Case Management and the Power of Myth*, ANDREWS COMMUNICATIONS SEMINAR 7 (Sept. 1991) (explaining game theory, which predicts that settlement values increase in multiple case situations). Whereas defendants would not be willing to settle for any appreciable amount if these claims were individually litigated, as part of a much larger group, these claimants may well receive far more generous terms. See also Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69. The author of *Mass Trials*, an attorney for one of the defendant's in the Las Vegas MGM Hotel Fire Litigation, notes that

[m]any of the bystander defendants' willingness to settle . . . had more to do with the enormous transaction costs and risks created by the mass trial than it had to do with the merits of the claims against them. [The case settlement] is troubling because it is not the result of applying legal principles to defendant conduct but the result of the economics of an extraordinary procedure—the mass trial.

*Id.* at 85.

<sup>232</sup> *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1387 (E. & S.D.N.Y. 1991) (citations omitted); see also Weinstein & Hershenov, *supra* note 5, at 297 ("If we persist in trying cases on an individual or even small-scale jurisdiction-by-jurisdiction basis, many plaintiffs will die before they are compensated, a great many will wait years, and some may receive nothing as the available monies are dribbled away by earlier awards and transaction costs.").

<sup>233</sup> *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. at 1387.

<sup>234</sup> *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990) (quoting *Arnold v. E. Airlines*, 681 F.2d 186, 193 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983)).

<sup>235</sup> See *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. at 1388 (citing *In re All Asbestos Cases Pending in the United States District Court for the District of Maryland* (D. Md. Dec. 16, 1983)).

<sup>236</sup> *Id.*

Several of these criteria are present in the Brooklyn Navy Yard Cases. A strong geographic nexus tied these asbestos cases together[:] plaintiffs' exposure at one worksite, the Brooklyn Navy Yard. The plaintiffs were represented by a few law firms and sued the same former manufacturers and distributors of asbestos-containing products. Extensive overlap in witnesses, primarily former co-workers at-testing to product identification at this worksite and medical and epidemiological experts, saved litigants time and money. The years of exposure spanned the period

properly structured, mass consolidations can result not only in the settlement of a substantial number of the consolidated claims, but also in fair trials for the nonsettling defendants.

The federal Brooklyn Naval Yard consolidation involved dividing the claimants into three classes for trial purposes: those in which over forty percent of claimed exposure to asbestos took place in the Yard (Phase I); those in which fifty to ninety percent of the claimed exposure took place in the Yard (Phase II); and all remaining cases involving claimed exposure to asbestos while working in the Naval Yard (Phase III).<sup>237</sup> After a substantial number of settlements, sixty-four Phase I cases went to trial against five defendants. Particular attention was paid to educating the jurors and facilitating the tasks to which they were assigned.<sup>238</sup> The care taken in the organization of these trials and the preparation of the jury yielded jury verdicts that reflected differences in disease seriousness<sup>239</sup> and such other relevant

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during which asbestos was utilized at the Navy Yard, beginning in the 1930's through the early 1970's.

*Id.* However, there is some indication that the jury did not properly distinguish the medical injury claims of the various plaintiffs. See Transcript, *supra* note 32, at 8.

<sup>237</sup> *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. at 1386.

<sup>238</sup> At the outset of the trial, each side presented teaching witnesses to educate the jurors generally about asbestos and introduce relevant medical and epidemiological studies on its effects. It was anticipated that the same jury would sit in all phases of the trials and therefore special attention was paid to training them.

The jurors were devoted to their work and gave sustained attention to the evidence. They were selected after filling out a searching written questionnaire prepared by counsel and court. Each juror chosen was aware that his or her work would require many months of painstaking effort. Each had a notebook with key documents, a photograph of each injured person and a summary of each case. Each juror took extensive notes using steno pads and pencils supplied by the parties. A photograph of each of the more than hundred and twenty witnesses was made available to the jury to refresh its memory. Summaries of depositions and detailed evidence and witness lists as well as full records of all medical history were sent to the jury room. Interim summations by counsel and short interim changes and explanations during trial were given by the court. Detailed charge sheets of some fifteen pages for each of the seventy-nine cases were filled out by the jurors (a total of more than a thousand pages of questions), enabling them to focus precisely on the issues. Where the law was unclear, alternate questions were put to the jury embodying the different legal theories to avoid the necessity of a retrial. Strict control over experts and extensive video and other depositions were relied on to reduce costs per case and to speed the trials. Much of the documentary evidence was studied by the jury in the jury room, avoiding hundreds of hours of courtroom time. Extensive use of slides, charts and other visual devices assisted the jurors. In all respects able counsel and distinguished expert witnesses on both sides cooperated to lend an air of dignity and clarity to the proceedings. The parties had as fair a trial as the court was capable of giving them.

*Id.*

<sup>239</sup> See Transcript, *supra* note 32, at 8.

factors as age and life expectancy.<sup>240</sup>

Even taking precautions, however, does not assure that significant jury confusion will not occur. As noted by U.S. District Court Judge Charles Butler in granting defendants' motion for a new trial of thirteen asbestos claims that he had consolidated for trial:

It is evident (unfortunately, in hindsight) that despite all the precautionary measures taken by the Court (e.g., juror notebooks, cautionary instructions before, during and after the presentation of evidence, special interrogatory forms) the joint trial of such a large number of differing cases both confused and prejudiced the jury. This confusion and prejudice is manifest in the identical damages awarded in the non-cancer personal injury cases and in the cancer personal injury cases, the relatively short deliberation time as well as in the inflated amount of many of the damage awards and the lack of evidence supporting some of the damages in several cases.<sup>241</sup>

*A fortiori*, mass consolidations which lack the extensive precautions used in the Brooklyn Naval Yard proceeding may be seen to impose an insurmountable burden on jurors to separate the testimony regarding one defendant from the testimony about another defendant.<sup>242</sup> This burden can result from: the number of claimants; the diversity of the claims; the diversity of the disease mix; either the lack of a common worksite or a common worksite which represents a minor portion of a claimant's asbestos exposure; the large number of defendants; the diversity of the evidence against the various defend-

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<sup>240</sup> The jury was repeatedly instructed to consider each case individually. Detailed separate verdict sheets were prepared for each plaintiff, greatly minimizing any confusion that might otherwise flow from the consolidation. The time the jury took during deliberations and their sequential requests for medical and other records and reading of testimony in each case attests to their careful and individualized treatment of each cause of action. Their precisely calculated and discriminating verdicts similarly reflect this attention to the variations in the cases. All verdicts were internally consistent and consistent with each other and the evidence.

*In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. at 1388.

<sup>241</sup> *Cain v. Armstrong World Indus.*, No. 87 Civ. 1172, slip op. at 14 (S.D. Ala. Feb. 18, 1992).

<sup>242</sup> After trying the consolidated *Cain* case, in which the jury's verdict did not appear to distinguish among claimants though their individual claims appeared to vary considerably in terms of age, severity, exposure, *et cetera*, United States District Court Judge Charles Butler reversed his order consolidating for trial a case with five plaintiffs and twelve defendants. Judge Butler stated:

Although a joint trial of all plaintiffs might promote the interest of judicial economy, the Court is of the opinion that the joint trial of the plaintiffs in each case would be prejudicial since the evidence as to each plaintiff's exposure and injury will vary greatly. Accordingly, the Court will try each plaintiff's claims separately.

*Hopper v. Celotex Corp.*, No. 89 Civ. 00768-B, slip op. at 1-2 (S.D. Ala. June 17, 1991).

ants; and the number of crossclaims by third-party defendants.<sup>243</sup> Mega-consolidations involving hundreds and thousands of claimants present additional concerns and reflect a view of adjudication that relegates the fairness of the trial—at least from the perspective of the defendants, as secondary to the need to resolve the thousands of outstanding claims—a view that has yet to be sustained on appeal.<sup>244</sup>

The most well known asbestos consolidation to date is *Cimino v. Raymark Industries*,<sup>245</sup> In *Cimino*, United States Chief Judge Robert Parker implemented entirely new procedures for adjudicating asbestos cases *en mass* in order to alleviate the “fortress mentality”<sup>246</sup> exhibited by asbestos defendants to avoid, or at least hinder, litigating asbestos claims. Judge Parker concluded that asbestos defendants were asserting the right to an individual trial in each case and to contest every issue in an effort to stonewall the plaintiffs and force them to drop their suits.<sup>247</sup> Armed with this antidefendant posture and a judicial mission,<sup>248</sup> Judge Parker designed a master plan for adminis-

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<sup>243</sup> See Richard A. Chesley & Kathleen Woods Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 507 (1985) (“In large scale mass tort actions, it is unlikely that any jury could reasonably determine the damages of hundreds of plaintiffs.”) (citation omitted); see also *Klager v. Inland Power & Light Co.*, 1 F.R.D. 114 (W.D. Wash. 1939) (court refused to consolidate 32 flood damage claims because it determined that thirty-two separate adjudications of proximate cause and damages would overburden any jury); Comment, *Consolidation in Mass Tort Litigation*, 30 U. CHI. L. REV. 373, 378-79 (1963) (explaining that convenience factors weighing in favor of consolidation must be balanced against the possibility of prejudice resulting from jury confusion); *Report, supra* note 1, at 39 (Hogan, J., dissenting).

<sup>244</sup> See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990). In *Fibreboard*, although the court expressed understanding of the view that mass trials are the only realistic means to try asbestos cases, it denied certification for a class of 2,990 asbestos claimants. The court maintained that those compelling arguments should be addressed to Congress and State Legislatures, as “[t]he Judicial Branch can offer the trial of lawsuits. . . . [T]he procedures here called for comprise something other than a trial within our authority. It is called a trial, but it is not.” *Id.* at 712 (emphasis added). See also *In re Allied-Signal, Inc.*, 915 F.2d 190, 192 (6th Cir. 1990) (nullifying an attempt by Judge Lambros of the District Court for the Northern District of Ohio to create a “national resolution to the asbestos-related personal injury litigation”) (citation omitted). In another case, *In re Ohio Asbestos Litig.*, OAL No. 96, 1990 U.S. Dist. LEXIS 15032 (N.D. Ohio July 16, 1990), Judge Lambros sought to establish a national class action in asbestos injury cases, explaining that his court has the largest concentration of asbestos cases in the federal and state court systems—7,000 cases with 13,000 claims pending. *Id.* at \*1. Judge Lambros suggested that the defendants could attain beneficial effects by consolidation that would enable them to expend their economic resources on research and development rather than on processing claims. *Id.* at \*3. This rationale appears to ignore the near insurmountable burdens placed on the jury as well as the enormous potential financial burdens placed on defendants.

<sup>245</sup> 751 F. Supp. 649 (E.D. Tex. 1990).

<sup>246</sup> *Id.* at 651.

<sup>247</sup> *Id.* at 651-52.

<sup>248</sup> “The great challenge presented to the Court by this litigation is to provide a fair and cost effective means of trying large numbers of asbestos cases. It is not enough

tering these cases by creating a class of 2,300 oil-refinery workers.<sup>249</sup>

In Phase I of the trial, the first jury would determine the common questions of fact: whether the defendants made asbestos-containing products which were defective and unreasonably dangerous; whether the warnings were adequate; the state-of-the-art defense and the fiber-type defense.<sup>250</sup> The jury would also determine whether the plaintiffs were entitled to punitive damages during Phase I.<sup>251</sup> Based on their determinations of culpability, the jury, by interrogatory, would assign a multiplier to each defendant which would be calculated against the actual damage amounts to determine liability for punitive damages.<sup>252</sup>

In Phase II, the juries would examine the worksites in question and use interrogatories to determine the time, place, craft, and amounts of exposure the plaintiffs were subject to at each location.<sup>253</sup> The plaintiffs' job descriptions were also considered.<sup>254</sup>

During Phase III of the trial, the damage awards would be determined. Judge Parker adopted a sampling method whereby 160 claimants, representing each of the five major diseases identified by the courts as caused by asbestos exposure (i.e., mesothelioma, lung cancer, other cancer, asbestosis, and pleural disease) would be individually tried. The average verdict for each disease category would constitute the award for each nonsample class member.<sup>255</sup> While the

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to chronicle the existence of this problem and to lament congressional inaction.

The litigants and the public rightfully expect the courts to be problem solvers."

*Id.* at 652.

<sup>249</sup> These 2,300 claims were filed as a result of the screening of thousands of oil-refinery workers by Dr. Gary Friedman who owns the Texas Lung Institute in Beaumont, Texas, a corporation which is primarily devoted to screening workers referred by plaintiffs' attorneys and unions. Oliver & Spencer, *supra* note 3, at 77. The Texas Lung Institute "has earned at least \$4 million in revenues since 1984. As an expert witness for the plaintiff, Friedman himself earns an additional \$3,500 a day when he testifies." *Id.* at 78. Among the 2,300 claims filed, the Institute diagnosed 32 mesotheliomas, 1,047 cases of asbestosis, 186 lung cancers, 57 other cancers and 972 cases of pleural thickening. Doctors who reexamined the plaintiffs for the defense found that more than 50% of those reexamined showed no signs of asbestos exposure. Moreover, oil refinery workers have a lower incidence of cancer than does the general population. *Id.* at 77-78.

<sup>250</sup> *Cimino*, 751 F. Supp. at 653. Judge Parker dispensed with the issue of proof—whether asbestos is inherently dangerous—noting that "every institution, apart from the courts" that has examined asbestos finds it to be so. *Id.* at 652.

<sup>251</sup> *Id.* at 653.

<sup>252</sup> *Id.* at 657-58.

<sup>253</sup> *Id.* at 653.

<sup>254</sup> *Id.* at 654.

<sup>255</sup> *Id.* at 653. According to defendants, the sample cases selected for trial were weighted in favor of the plaintiffs. Although 1.4% of the whole group had been diagnosed with mesothelioma, 9% of the sample group had mesothelioma. Moreover, Judge Parker did not permit the jury to hear evidence regarding the more than 2,000 cases not in the sample groups. *Id.* at 665.

defendants claimed that this scheme was a violation of their due process right to individual trials.<sup>256</sup> Judge Parker in essence concluded that the need to adjudicate a vast number of claims warranted depriving the defendants of individual hearings.<sup>257</sup>

The valuation assigned under this system (including punitive damages) to each pleural plaque claimant was \$540,000, and to those diagnosed with mesothelioma, \$1.2 million, for a total award of \$1.3 billion.<sup>258</sup> The verdicts and assigned values contrasted markedly with the medical evidence introduced by defendants.<sup>259</sup> If these valuations were to be effectuated in other jurisdictions, every single asbestos defendant would be driven into bankruptcy,<sup>260</sup> including defendants with at most a peripheral relationship to the former asbestos industry.

An example of a mass consolidation that presents the jury with a most formidable and potentially impossible task is the presently ongoing *In re Joint Eastern And Southern District Asbestos Litigation* ("The Powerhouse Cases").<sup>261</sup> United States District Court Judge Charles Sifton, over the objection of defendants,<sup>262</sup> has consolidated 882 claims brought by union workers against approximately fifteen manufacturers of asbestos-containing materials which were used in the construction of electrical power generating stations. Judge Sifton had ruled that the cases would be tried in groups of fifty in a reverse bifurcation, that is, the jury would first determine whether there was asbestos-related injury (medical causation) and if so, the amount of damages; at a later time, the issue of liability would be determined. The Powerhouse consolidation differs in several respects from the Brooklyn Naval Yard consolidation; one major difference is that one of the defendants, Owens Corning-Fiberglas, has been permitted to implead approximately 200 additional third-party defendants includ-

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.* For the view that the *Cimino* aggregation techniques—sampling cases from the total asbestos claims filed within a jurisdiction, trying the sample and then extrapolating the results of those cases, and applying them to the remainder of the claims without subjecting those plaintiffs to individual trials—have the potential to achieve a higher level of accuracy than is possible in traditional individual trials, see Michael Saks & Peter Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. (forthcoming 1992). The extrapolation to the nontrial group in *Cimino* meant that such variables as age, smoking, exposure history, severity, degree of impairment, *et cetera* were not taken into account for the nontrial group. This factor is not discussed in the Saks and Blanck piece which primarily focuses on the accuracy of the *Cimino* methodology. My focus in this Article is on the validity of the process used by Judge Parker.

<sup>258</sup> Oliver & Spencer, *supra* note 3, at 78.

<sup>259</sup> *Supra* note 249.

<sup>260</sup> See *supra* note 204.

<sup>261</sup> 769 F. Supp. 85 (E. & S.D.N.Y. 1991).

<sup>262</sup> Defendants almost always object to consolidations.

ing utilities, site owners, other manufacturers, the construction companies, and contractors who worked on the power plants where the exposure took place, as well as the architects and engineers. The result of the impleader is a two-front war against the manufacturing defendants—the plaintiffs on one front and the third parties on the other, both blaming the manufacturers.<sup>263</sup>

The jury's<sup>264</sup> task is to determine which of defendants' products plaintiff number one was exposed to and whether that exposure was sufficient to cause an asbestos-related disease (the jury having already decided that plaintiff was injured by exposure to asbestos). Many of the plaintiffs did not work directly with asbestos-containing materials, but rather claim "standby" exposure, that is, they worked along side others who did use asbestos-containing materials.

The jury's task in this consolidation is complicated by the cumulative nature of the occurrence of asbestos-related disease. Since a plaintiff might have been exposed during a three-month or six-month period of work on a powerhouse to the products of several manufacturers, but may also have been exposed to asbestos-containing products at one or more of 50 to 100 other work sites at which this plaintiff worked which are not a part of the litigation as well as to other toxic substances in the workplace and elsewhere that could have caused the

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<sup>263</sup> A typical trial day involves plaintiff's counsel putting on one of the fifty plaintiffs or a coworker who will testify as a witness. The direct examination takes from one to two hours. Owens-Corning Fiberglas then cross-examines the witness for two to four hours in a tedious site-by-site examination geared at inculcating the other defendants and third-party defendants. A handful of the remaining defendants then cross-examine the witness in an attempt to undo any damage done them by the Owens-Corning Fiberglas cross-examination. Then the third-party defendants, principally the utility companies, question the party or witness, seeking to inculcate Owens-Corning Fiberglas specifically and the other defendants generically, while painting themselves as victims, like the plaintiffs, of the manufacturing defendants. Then there is re-direct, re-cross by Owens-Corning Fiberglas and other defendants and re-cross by the third-party defendants. The day ends with the witness having been exhaustively and tediously examined about every site that he ever worked at in his forty-year career and his exposure to asbestos at each and every site. Trial began on April 1, 1991. Those assembled on a typical day include seven plaintiffs' lawyers, fifteen defendants' lawyers, and fifty to one-hundred third-party defendants' lawyers sitting (and, on a crowded day, standing) behind the rail in the public seating section.

The likelihood that at least 10-30% of the lawyers in attendance are superfluous is great. Collectively, the defendants' bill is accumulating at the rate of \$15,000 to \$30,000 per hour, and including other staff working on the cases, at the rate of \$150,000 to \$300,000 per day. The Ad Hoc Committee Report refers to a federal court trial involving four plaintiffs but between 41 and 58 lawyers and legal billings of \$3-7 million. *Report, supra* note 1, at 12-13.

<sup>264</sup> The twelve jurors consist of postal workers, government workers, and housewives. During the examination, the jurors take notes in one of the three binders they each juggle in their laps. Each has a plaintiffs' binder, a defendants' binder, and a work-site binder. Note taking varies widely by juror; some are copious note takers, while others rarely open their binders. The trial is expected to last through January 1992 for the first 50 of the 882 cases.

injury, it may be that the predominant causative elements of his disease are not powerhouse-site related. The jury will have to assess for each plaintiff what percent, if any, of the disease was caused by exposure to asbestos at the powerhouse site and what percent was caused by other exposure.

The jury's task is at best a formidable one. Even college-educated jurors with occupational experience in dealing with complex-fact situations would find it extremely difficult to keep their decision process separate regarding plaintiff number one and the multitudinous defendants eligible for assignment of liability, from the evidence regarding plaintiff number two, and number three, *et cetera*. Vast amounts of evidence will have been introduced. Jury verdict forms will require the jurors to assess liability for each of the parties. If a major effort at settlement bears fruit, then the task confronting the jury could be ameliorated.<sup>265</sup> Barring settlements with at least several major defendants, it remains to be seen what will result from imposing such a formidable burden on the jurors.

#### G. Successor Liability

The use of the doctrine of successor liability has been of critical importance in the creation of a perverse incentive structure and engineering of the asbestos-litigation crisis. Along with decisions imposing liability on insurers arguably inconsistent with policy coverage, successor liability decisions have been instrumental in creating the requisite funding to support the current asbestos-litigation industry.

Most of the major current asbestos defendants participated in the manufacture of asbestos-containing products by virtue of having acquired smaller companies that were engaged in manufacturing such materials. In most instances, the sale of asbestos-containing products accounted for a small percentage of the sales of the parent corporation.<sup>266</sup> Had the companies which manufactured asbestos-containing products not been acquired by much larger corporations, asbestos litigation would have been largely confined to the Johns-Manville Corporation and a few other defendants; and, upon the bankruptcy of Manville and other smaller producers, the litigation would likely have never achieved its current status.<sup>267</sup>

Two judicial actions expanded the litigation to its current dimen-

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<sup>265</sup> See, e.g., *supra* note 19. Settlement by Owens-Corning Fiberglas would yield the greatest ameliorative effect on the jury's burden since that would eliminate most third-party claims.

<sup>266</sup> See, e.g., OI PROSPECTUS, *supra* note 43; KEENE CORP., 1990 ANNUAL REPORT 4 (1991).

<sup>267</sup> Injury manifestation would, of course, have continued.



sions: insurance coverage extension and the use of the successor liability doctrine. By extending insurers' liability to their insureds for asbestos-related injury to include liability insurance in force at the time of the occupational exposure to asbestos, plus liability insurance in force when the asbestos-caused injury was manifested, plus all other liability insurance in force in between—the so-called “triple trigger,”<sup>268</sup>—courts have created approximately seven to nine billion dollars of insurance coverage.<sup>269</sup>

To enable claimants to have access to this coverage, successor corporations were held liable for the acts of their far smaller acquired companies—acts that occurred prior to the acquisitions. This was effectuated by invoking the doctrine of successor liability.<sup>270</sup> Under this doctrine, successor companies are held liable not only for acts they did not commit, but also for the consequences of the acts of their acquired companies that they were not aware of at the time of the acquisition and of which they could not have been aware.<sup>271</sup> In theory, however, successor liability is not predicated on punishing the acquiring company for its acquisition of a bad actor but rather on

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<sup>268</sup> See *supra* note 51.

<sup>269</sup> *Supra* note 53. There has been substantial litigation brought by insureds against insurance companies in the course of asbestos litigation. See, e.g., *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 951 (1982). A number of such suits are currently underway and may substantially enlarge the pool of money available to claimants. See also OI PROSPECTUS, *supra* note 48, at 49, in which coverage of \$960 million has been determined by an April 1990 summary judgment in one case. In addition, a number of the insurance coverages for asbestos defendants provide for unlimited defense costs until the underlying coverage is consumed. Accordingly, a calculation of the extent of insurance coverage is necessarily tentative and is significantly impacted by pending litigation against insurers.

<sup>270</sup> Successors are generally held liable for acts of their acquired companies if the asset acquisition falls into one of four generally recognized categories: “1) the successor expressly or impliedly assumes the predecessor’s liabilities; 2) the predecessor and successor consolidate or merge; 3) the successor is a mere continuation of the predecessor; or 4) the transaction is a fraudulent attempt to escape liability for the predecessor’s obligations.” Keith A. Ketterling, *A Proposal for the Proper Use of Punitive Damages Against a Successor*, J. CORP. L. 765, 765-66 (1986). See, e.g., *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974). Since these four factors create such a low threshold, some commentators have argued that the form of the acquisition should not dispositively prove whether that successor should be held liable. James A. Barringer, Note, *Expanding the Liability of Successor Corporations*, 27 *HASTINGS L.J.* 1305, 1309 (1976). Nonetheless, these are commonly used criteria. See, e.g., *Bardere v. Zafir*, 477 N.Y.S.2d 131, 135 (N.Y. App. Div.), *aff’d*, 482 N.Y.S.2d 261 (1984).

<sup>271</sup> See *supra* note 51. That asbestos companies were not aware of the liabilities they were assuming by acquiring these manufacturers is established by the fact of the acquisition. No profit-motivated corporation would have purchased an asbestos manufacturer had it even remotely been aware of the extent of the liability that it was acquiring. Moreover, since most of the relevant acquisitions took place in the 1950s and 1960s, the acquiring companies could not then have known that the acts of the companies being acquired, which took place mainly in the 1940s, 1950s, and 1960s, would come to be judged by radically different legal standards to be created in the 1970s and 1980s. See *supra* note 23.

punishing the acquired company for its bad acts. That is, by imposing liability on the acquiring company for the previous acts of the acquired company, the acquired company is being punished since its market valuation will reflect the liability to be imposed upon any acquiring company.<sup>272</sup> However, as applied in the asbestos context, the reality belies the theory.<sup>273</sup>

Successor liability in asbestos litigation is simply a windfall for plaintiffs and an essential ingredient in a strategy to maximize available resources to compensate claimants.<sup>274</sup> To be sure, a nonmaximizing court could nonetheless apply successor liability—even while recognizing that a windfall is being created, because the alternative is to impose a shortfall. That is, if the successor is not to be held liable for the acts of the acquired company,<sup>275</sup> then the claimant must look to the assets of the acquired company. However, those assets are unavailable because of the acquisition. Hence, if the choice is between a shortfall and a windfall for the claimant, courts will and do choose the windfall.

It is possible, however, to create an even-handed outcome by essentially limiting plaintiffs' judgments based upon acts of the acquired company before the date of acquisition, to the amount they would have been able to collect had the asbestos-containing material manufacturer not been acquired by another company. In appropriate circumstances—where the acquiring company did not and could not have reasonably known of the legal consequences of the acquired company's previous acts—a court could limit the amount of a judgment against a successor corporation to the increase in the net worth of the acquiror as a consequence of the acquisition plus any profits or losses generated as a consequence of the acquisition, plus whatever insurance coverage the acquired company had in force. An alternative calculation yielding a higher award to claimants would be to limit the at-risk assets to the price of the acquisition adjusted for any profits or losses sustained since the acquisition in addition to whatever insurance coverage of the acquired company was in force. Courts which have devised the procedurally complex mass consolidations or bank-

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<sup>272</sup> See Barry Levenstam & Daniel Lynch, *Punitive Damages Awards Against Successor Corporations: Deterrent of Malicious Torts or Legitimate Acquisitions?*, 26 TORT & INS. L. J. 27 (1990).

<sup>273</sup> When successor liability is imposed in a situation where the acquiror did not and could not have known of the liability accompanying the acquisition, the effect is not to punish the bad actor but rather to punish all acquirable companies.

<sup>274</sup> Cf. RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988).

<sup>275</sup> Under successor liability, a billion dollar corporation can buy a company for one million dollars and end up with far more than a billion dollars in liability without ever having knowingly contemplated that it was assuming a liability of such magnitude.

ruptcy trust funds which are becoming the hallmark of asbestos litigation,<sup>276</sup> would not regard the task of sequestering the assets of the acquired corporation within the acquiror as an unduly burdensome task.

The windfall aspects of successor liability are magnified exponentially by the allowance of punitive damage awards against the successor for the acts of the acquired company. Simply stated punitive damage awards based upon successor liability are unabashed windfalls.<sup>277</sup>

### III. FEDERAL RESPONSIBILITY

The need for legislation to create an administrative claim procedure is enhanced by the evidence developed to date of federal responsibility for injury to shipyard workers.

Approximately 4.5 million workers were employed in government and contract shipyards during World War II, building ships for the war effort.<sup>278</sup> The government deemed asbestos to be absolutely indispensable in the construction of high-pressure steam-powered ships; indeed, asbestos was termed a "strategic and critical material" to the war effort.<sup>279</sup> The War Production Board assumed total control of production and distribution of all asbestos supplies in the United States and simultaneously restricted the use of asbestos to meet military needs.<sup>280</sup> Manufacturers failing to comply with the

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<sup>276</sup> See *supra* notes 209-65 and accompanying text.

<sup>277</sup> See Kevin F. McCarthy, Comment, *Killing the Son for the Sins of the Father: The Impropriety of Punitive Damages Against a Successor Corporation*, 1986 ARIZ. ST. L.J. 101, 125 ("Imposing punitive damages on a successor corporation is inconsistent with the role of punitive damages.").

<sup>278</sup> JOSEPH A. ARTABANE & CATHERINE R. BAUMER, DEFUSING THE ASBESTOS LITIGATION CRISIS: THE RESPONSIBILITY OF THE U.S. GOVERNMENT 4 (1986). One hundred and thirty-one shipyards operated on a twenty-four hour-a-day, seven-day-a-week schedule, building 7,000 ships and performing 67,000 repairs. *Id.*

<sup>279</sup> On June 7, 1939, Congress enacted the Strategic and Critical Materials Stock Piling Act, whose purpose was to:

provide for the common defense by acquiring stocks of strategic and critical materials essential to the needs of industry for the manufacture of supplies for the armed forces and the civilian population in time of a national emergency, and to encourage, as far as possible, the further development of strategic and critical materials within the United States for common defense.

Strategic and Critical Materials Stock Piling Act, Pub. L. No. 76-117, 53 Stat. 811 (1939) (codified as amended at 50 U.S.C. §§ 98, 98h-4 (1988)). Asbestos was one of twenty-nine substances regulated by the Act.

<sup>280</sup> The War Production Board established a special division termed the Cork, Asbestos & Fibrous Glass Division to:

plan, direct, and coordinate the policies and programs of War Production Board to provide and maintain an adequate supply of cork, asbestos and fibrous glass to fill national defense and civilian needs. Such programs are designed to provide for

War Production Board's requirements could be subject to criminal prosecution.<sup>281</sup>

Significant evidence exists that the government knew of the hazards of exposure to asbestos,<sup>282</sup> and yet did not provide a safe, well-ventilated workplace,<sup>283</sup> nor appropriate equipment protections, such as respirators. In support of the war effort, a conscious choice was made not to inform shipyard workers of the hazards of asbestos and of the need to take precautions.<sup>284</sup> This decision appears to have

adequate and maximum production, necessary conservation and effective distribution and utilization of [these] products. These functions are executed through gathering fundamental data . . . [on] stockpiles . . ."

CORK, ASBESTOS & FIBROUS GLASS DIVISION, WAR PRODUCTION BOARD, BUDGET ESTIMATE FOR FISCAL YEAR 1944, at 2 (1944), *reprinted in* ARTABANE & BAUMER, *supra* note 278, at 32-33. The government assumed substantial control over private shipyards as well. FREDERIC C. LANE, SHIPS FOR VICTORY 108 (1951).

<sup>281</sup> Conservation Order M-123, § 1172.1(e), 7 Fed. Reg. 2472 (1942).

<sup>282</sup> For example, in 1939, the Surgeon General of the Navy reported:

Asbestosis is an industrial disease of the lungs incident to the inhalation of asbestos dust for prolonged periods.

[W]orkers in the Pipe-Covering and Insulating Shop [of the New York Navy Yard] are exposed to the inhalation of asbestos dust . . . Special attention is given to the working conditions in hazardous occupations such as . . . asbestos pipecovering . . .

ANNUAL REPORT OF THE SURGEON GENERAL, U.S. NAVY, CHIEF OF THE BUREAU OF MEDICINE AND SURGERY, TO THE SECRETARY OF THE NAVY CONCERNING STATISTICS OF DISEASES AND INJURIES IN THE UNITED STATES NAVY YARD FOR THE CALENDAR YEAR 1939-24 (1941) *reprinted in* ARTABANE & BAUMER, *supra* note 278, at 14.

After a survey of one of the government shipyards in 1941, a team of surveying scientists concluded:

[W]ork at the asbestos shop created a very real asbestos hazard, as the dust and fibres were found all over the shop on rafters, machines, benches and on the workmen's clothing. The most dusty processes should be segregated into a well-ventilated room and periodic examinations of the workers' chests should be made.

*Industrial Health Survey of South Portland Ship Corp. and the Todd-Bath Iron Works, South Portland, Maine*, Sept. 18, 1942, at 11-12, *reprinted in* ARTABANE & BAUMER, *supra* note 278, at 15.

<sup>283</sup> See *Industrial Health Survey of the Bath Iron Works Corporation, Bath, Maine*, Sept. 22, 1942, at 12, *reprinted in* ARTABANE & BAUMER, *supra* note 278, at 15-16 (reporting that the conditions in one pipecovering shop presented a hazard and the home-made exhaust system therein had "practically no effect as dust spreads in all directions.")

<sup>284</sup> See *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380 (E. & S.D.N.Y. 1991) stating that:

During World War II and for the next thirty years thereafter, thousands of [Brooklyn Navy Yard] workers were exposed to dangerous airborne asbestos fibers without being advised of the potential health consequences. The Navy, though aware of the hazards posed by asbestos dust, in its urge to build its warships as quickly as possible, did not inform workers of the dangers and neglected to take available protective precautions. The United States now disclaims liability from behind its shield of sovereign immunity. Those injured have therefore turned to the manufacturers for redress, basing their claims on lack of warning on products or packaging.

Even after World War II, the Government sold asbestos fiber from Govern-

been made at the highest levels of government.<sup>285</sup> The government violated its responsibilities pursuant to the Federal Employees' Compensation Act,<sup>286</sup> and the Walsh-Healey Act<sup>287</sup> requiring that it establish and supervise workplace standards with regard for its own employees and contractors' employees.

In light of the extent of government wartime control over the uses of asbestos, Congress must assess the government's burden in providing compensation to injured workers.<sup>288</sup> While workmen's compensation programs have insulated the government from shouldering a huge damage burden, the government has so far been compelled to foot only a most minute share of the assessed liabilities under the current system.<sup>289</sup> Potential liability nonetheless exists.<sup>290</sup> The

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ment stockpiles; other asbestos-containing materials were supplied to the Government in compliance with Government contract specifications mandating the use of asbestos-containing materials. As late as 1979, U.S. Navy officials maintained that it was impossible to build naval vessels without asbestos.

*Id.* at 1384.

<sup>285</sup> My meeting with Mr. Bard was specifically due to the fact that Captain Fisher had written a letter to Dr. Selby inviting him to make a survey of Navy Yards, with particular reference to health hazards . . . .

I told him that I had spoken to you and that you had indicated that President Roosevelt thought that this might not be the best policy, due to the fact that they might cause disturbance in the labor element . . . .

None of our foundaries would pass the necessary inspection to obtain workmen's compensation insurance from any of the insurance organizations. I doubt if any of our foundaries would be tolerated if the State industrial health people were to make surveys of them.

See Memorandum from C.S. Stephenson, Commander, U.S. Navy, to Admiral McIntire, Mar. 11, 1941, at 1. (on file with author); see also Transcript, *supra* note 32:

The evidence indicated that Government, particularly during the war years, was aware of the fact that the work of these men and women exposed them to asbestos with a serious risk they would be injured or die.

The Government, however, allowed the work to continue without adequate protection of the workers in order to expedite the production of ships for the war and cold war.

The evidence produced indicates that these risks were known to Government officials at least as high as the highest Navy personnel and probably known to the President of the United States.

*Id.* at 3.

<sup>286</sup> 5 U.S.C. §§ 8101-8193 (1988).

<sup>287</sup> 41 U.S.C. §§ 35-45 (1988).

<sup>288</sup> "Well, let me cut through a lot of this and tell you there's no doubt in the Court's mind—the Southern District and Eastern District's Court's mind, anyway, that the Government is primarily responsible as a factual matter." Transcript of Hearing Before Hon. Jack B. Weinstein at 16, *In re New York Asbestos Cases*, (E.D.N.Y. July 12, 1990) (Tr. No. TS 90-9999).

<sup>289</sup> Claims for the indemnification of manufacturers have been brought against the government under the Court of Claims Act, 28 U.S.C.A. § 1491 (West Supp. 1991), which confers jurisdiction on the Claims Court to hear contract claims against the United States for sums

creation of an administrative-claim procedure would relieve the government of its potential liability for claims brought under those statutes, and government payments to the administrative-claim fund would put the financial responsibility on the responsible party.

### CONCLUSION

In this article, I have attempted to capture certain salient features of current asbestos litigation. My subject, judicial decisions made with consciousness of the financial deficit created by the Manville bankruptcy, has been described by knowledgeable observers as creating an "impending disaster."<sup>291</sup> Post-Manville bankruptcy asbestos litigation has often yielded highly unpredictable, arguably inequitable, and often seemingly arbitrary results. Juries confronted with essentially the same fact situations have reached outcomes ranging from zero recovery to million dollar awards. This "asbestos lottery" has attracted increasing numbers of unimpaired claimants to try their luck; portfolio management principles provide a strong incentive for plaintiffs' attorneys to maintain the flow of claims. Current data, by no means dispositive but at least highly suggestive, indicate that over sixty percent of new claims are on behalf of unimpaired persons.

Post-Manville bankruptcy decision making, though intended to compensate the truly injured, has led to unintended results. In summary, the aggregative effects of this decision making include:

- (i) the creation of substantive and procedural rules comprising a

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over \$10,000 and under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1965, 1967, & 2671-2680 (West Supp. 1991), which waives the sovereign immunity for tort claims against the United States and confers jurisdiction on federal district courts to hear the claims. A broad exception lies in the "discretionary function" clause, *Id.* § 2674, which excludes claims based upon an act or omission of an employee of the United States government in the execution of a statute or regulation or discretionary function or duty. This has been held to exclude government liability for its shipyard activities. *Eagle-Picher Indus. v. United States*, 937 F.2d 625 (D.C. Cir. 1991); *In re Eastern & S. Dists. Asbestos Litig.*, 891 F.2d 31 (2d Cir. 1989); *In re All Maine Asbestos Litig.*, 655 F. Supp. 1169 (D. Me. 1987), *aff'd in part and vacated in part*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied sub nom.* *Raymark Indus. v. Bath Iron Works Corp.*, 476 U.S. 1126 (1986).

<sup>290</sup> The United States Court of Appeals for the District of Columbia Circuit recently reaffirmed the availability of federal court subject matter jurisdiction for claims for contribution from the Federal Government in state court actions. See *Eagle-Picher Indus. v. United States*, 937 F.2d 625 (D.C. Cir. 1991). Defendants may also implead the United States under the Federal Tort Claims Act. 28 U.S.C.A. § 1491 (West Supp. 1991). In such cases, the government is liable to the extent a private employer in like circumstances would be liable and its sovereign immunity is waived with respect to federal employees for whom substantive state law grants a right of recovery. See *id.*; see also *In re All Maine Asbestos Litig.*, 655 F. Supp. at 1170-71. New York substantive law grants such a right of recovery. *Gregory v. Garrett Corp.*, 578 F.2d 871 (S.D.N.Y. 1983).

<sup>291</sup> See Report, *supra* note 1.

special "asbestos law," incrementally fashioned to respond effectively to the needs of seriously injured claimants for compensation;

(ii) the application of this "law" to those less seriously injured and most especially to those unimpaired who are highly motivated to seek compensation because of its availability;

(iii) the use of unsupervised contingent fees for lawyers that often yield hourly rates of return of \$1,000 and more and drive them to search for more claimants and asset pools;

(iv) the increasing prevalence and judicial tolerance for punitive damages as a docket control device and occasionally as a way to accelerate the payment of monies to claimants as a counter to the increasing numbers of defendant bankruptcies; and

(v) the use of mass consolidations and other forms of docket control that accentuate the likelihood of compensating the unimpaired and which may also yield:

- (a) higher verdicts per case than in the absence of consolidation;
- (b) higher settlement values;
- (c) fewer settlements since the simultaneous increase in the number of cases to be settled and in the value per case imposes a financial burden on some defendants beyond their financial capacity thereby reducing the likelihood of settlement and increasing the likelihood of bankruptcy;
- (d) effectively unappealable judgments since bonding requirements are often a multiple of the mass consolidation judgment and are therefore such substantial sums of money—in the tens and hundreds of millions of dollars—as to be beyond the financial ability of some defendants;
- (e) an imposition of an information burden on jurors beyond the average juror's capacity resulting in group rather than individual decisions that are not reflective of significant factual distinctions among the several or many plaintiffs; and
- (f) having juries quite unrepresentative of the community since relatively few potential jurors can sit for a consolidated trial which often runs for at least six or eight weeks, thereby effectively precluding jurors who are professionals, small business owners, and many employed persons (other than school teachers and federal government employees) from serving.

I have termed these and other facets of current asbestos litigation a perverse incentive structure. This structure has evolved into a massive counterweight to efforts to capture sufficient financial resources to compensate the injured. It is a structure now so integral a part of the asbestos-litigation system that it may be substantially impervious to deconstruction. The conclusion I draw from this analysis is that the goals of compensating the injured, disenfranchising the unimpaired and their agents, and maintaining the financial viability of most of the remaining defendants can best if not only be attained<sup>292</sup> by congressional action to create an administrative alternative to litigation. With fidelity to the "sign above the barroom door,"<sup>293</sup> I have prepared such a proposal.<sup>294</sup>

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<sup>292</sup> The use of pleural registries would accomplish at least some of these goals. See Peter Schuck, *supra* note 5. It would not, however, deal with the disputed asbestosis claims. See *supra* notes 119-25. That could be met by the use of court-appointed medical experts in place of plaintiffs' and defendants' experts. See *supra* note 120.

<sup>293</sup> "Please don't shoot the piano player . . . unless you can play the piano."

<sup>294</sup> Brickman, *supra* note 14.



